No. 553

In the Supreme Court of the United States

OCTOBER TERM, 1942

JOSEPH GALLOWAY, BY FREDA GALLOWAY, HIS GUARDIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 135–141) is reported in 130 F. (2d) 467.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 1, 1942 (R. 142). The petition for a writ of certiorari was filed on November 28, 1942, and granted on January 4, 1943

(R. 142). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended February 13, 1925.

QUESTION PRESENTED

Whether the courts below correctly held that petitioner had not adduced substantial evidence to show that the insured was totally permanently disabled on May 31, 1919.

STATUTES AND REGULATIONS INVOLVED

The insurance contract sued on was issued pursuant to the provisions of the War Risk Insurance Act, and insured against death or total permanent disability (c. 105, Sec. 400; 40 Stat. 398, 409).

The same Act, as amended, provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes * * * (c. 77, Sec. 13; 40 Stat. 555).

Pursuant to this authority, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

> gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * * (Regulations and Procedure, U. S. Veterans' Bureau, Volume 1, p. 9).

STATEMENT

Petitioner seeks to recover total permanent disability benefits under a contract of yearly renewable term insurance which was issued to Joseph Galloway on February 1, 1918, and which lapsed on May 31, 1919, at the expiration of the grace period for payment of the premium due on May 1, 1919 (R. 14–15).

The case was tried to a jury with issue joined on the alleged occurrence of total permanent disability while the policy was in force. After the introduction of all the evidence, the District Court granted the Government's motion for a directed verdict upon the ground that there was no substantial evidence to show that the insured was totally permanently disabled before the policy lapsed (R. 127–128). The jury was instructed to return a verdict for the Government, and judgment was entered upon this verdict (R. 13–14).

Upon appeal, the judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit (R. 135–141).

The Circuit Court of Appeals held that the facts, established by undisputed evidence, that subsequent to the date of alleged total permanent disability the insured served an enlistment in the United States Navy and another in the United States Army, prevented any reasonable inference that he became totally permanently disabled as alleged. In this respect, the court referred in its opinion to evidence showing that the insured passed several medical examinations incident to these periods of service; that the records of his service disclosed no recognition of mental disorder; and that officers under whom he served regarded him as sane and able to perform regular military duty which he did, in fact, perform.

The court also expressed the view, in its opinion, that the evidence favorable to petitioner, considered by itself, provided a basis for nothing more than speculation and conjecture that the insured might have been totally permanently disabled prior to May 31, 1919. In addition, it characterized the lack of evidence covering a period of many years following 1922 as a "failure in appellant's [petitioner's] case."

SUMMARY OF ARGUMENT

The law requiring the direction of a verdict in the absence of substantial evidence is long established and is as applicable to litigation upon a contract of war-risk insurance as to any other litigation. And where, as here, the trial court has

directed a verdict and the Circuit Court of Appeals has ruled that the direction of the verdict was proper, this Court "will rightfully be much influenced by their concurrent opinions." *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, 660.

Petitioner alleges maturity by total permanent disability of a contract which expired May 31, 1919. The alleged cause of the claimed maturity is a mental disorder first found upon medical examination in 1930, and thereafter diagnosed as dementia praecox.

The testimony of petitioner's expert medical witness, insofar as it has any substantial tendency to support the claim, is without adequate factual foundation. And the evidence as a whole, if it may be reconciled with the hypothesis relied upon by petitioner, is equally if not more consistent with an hypothesis that the insured suffered periodically, from 1918 to 1922, from the effects of his demonstrated addiction to intoxicants, and inferable addiction to narcotics; hence the evidence has no substantial tendency to establish petitioner's hypothesis. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343.

Thus the very existence of dementia praecox during the life of the contract is speculative. But even if it is assumed that the isolated instances of abnormal behavior shown by the record were recurring manifestations of dementia prae-

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cox, the evidence relied upon to establish total disability at that time [as the result of the assumed existence of this disease] is sketchy at best, and any inference of total disability sought to be drawn therefrom would be directly contrary to undisputed facts showing that, during substantial periods, no total disability existed from any cause.

Finally, it is a fatal deficiency with respect to petitioner's further burden of showing the permanence of total disability during the life of the contract that petitioner should have omitted any proof with respect to the condition and activities of the insured over so extended a period as eight years. Especially is this true where, as here, the disease relied upon as having created a permanent total disability is one frequently recognized in decided cases as subject to periods of remission and as being, during such periods, consistent with the pursuit of many substantially gainful occupations.

Berry v. *United States,* 312 U. S. 450, and *Halliday* v. *United States,* 315 U. S. 94, relied upon by petitioner, are of no assistance to her. The facts in the former differ so markedly from those in the instant case as to deprive that case of any relevance other than as an example of the multitude of cases applying the established substantial evidence rule. The *Halliday* case, however, is pertinent and appears upon analysis to support the correctness of the decisions below.

ARGUMENT

THE COURTS BELOW PROPERLY HELD THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SHOW THAT THE INSURED WAS TOTALLY PERMANENTLY DISABLED ON MAY 31, 1919.

Petitioner asserts that she presented substantial evidence to show that the insured was totally permanently disabled on May 31, 1919, by reason of insanity. She relies upon laymen's descriptions of the insured's conduct and appearance upon occasions in 1918 and the immediately ensuing years; medical diagnoses of the insured's condition in 1930 and thereafter; and the opinion testimony of one medical witness, who first saw the insured in August 1941, as to the condition reflected by the lay testimony pertaining to the period prior to 1922.

The Government concedes that the evidence would support a finding that the insured was totally permanently disabled at the time of the trial 1941, and the court below assumed total permanent disability from February 1932, when petitioner was appointed guardian. Insured was found, upon medical examinations in 1930 and thereafter, to have a mental disability. The condition, as described by Dr. Wilder, who examined the insured in 1941, may reasonably be regarded as totally disabling at that time, and Dr. Wilder testified to an opinion that it was then permanent.

However, the period of more than ten years

between the lapse of the insurance in early 1919 and the diagnoses of mental disorder in 1930 is not spanned, we believe, by substantial evidence of total permanent disability. The expert opinion testimony—designed by petitioner to bridge that period—is devoid of probative value for that purpose because of the inadequacy of the factual foundation upon which it rests. Moreover, there are undisputed facts wholly inconsistent with an inference that the insured was totally disabled while his insurance was in force and thereafter for the period 1919 to 1922. Even if it were to be assumed that the insured became totally disabled by reason of insanity while his policy was in force, the lack of any evidence to show continuance of total disability from 1922 to 1930 would nevertheless constitute a fatal deficiency in petitioner's proof.

I. SUMMARY OF THE EVIDENCE

The insured, who had worked as a longshoreman, "catch as catch can," in Philadelphia and elsewhere (R. 27–28), enlisted in the Army on November 1, 1917 (R. 120). A fellow soldier, closely associated with him, testified that in December 1917 the insured was "just a regular soldier," apparently normal and neat in appearance, and neither nervous nor quarrelsome (R. 42–43), and that this condition continued until they arrived in France about the middle of April 1918, when the insured

began to be quarrelsome and nervous (R. 42, 46).

The only other evidence antedating April 1918 is the notation in the insured's service records: "Summary court martial approved February 2, 1918, Articles of War 61" (R. 121). The 61st Article of War has to do with absence without official leave[1] (R. 55).

The witness Wells testified that, during the night of April 16, 1918, the insured disturbed the camp at Aizonville, France, by "hollering, screeching, swearing" (R. 32), with cause not known to the witness (R. 36); that "the men poured out from the whole section" (R. 32); "the officers went up to quiet him"; "I saw the result, a black eye for Lt. Warner"; but "You didn't see who gave it to him? No" (R. 40–41). The witness testified that the insured was then transferred to battalion headquarters, and that he last saw him in July 1918, serving food from a field kitchen (R. 37–38).

Another witness, Tanikawa, who had renewed his acquaintance with the insured in 1936 (R. 47), testified that, in June 1918, while on guard duty at night on the bank of the Marne River, the

[1] That Article (10 U. S. C. 1533) provides:

"Any person subject to military law who fails to repair at the fixed time to the properly appointed place of duty, or goes from the same without proper leave, or absents himself from his command, guard, quarters, station, or camp without proper leave, shall be punished as a court-martial may direct."

insured screamed "The Germans are coming!" when there was nothing to indicate to the witness, who was nearby, any activity on the part of the Germans, who were on the opposite bank of the river (R. 44–45; cf. R. 36). This witness testified that the insured appeared to be out of his mind and insane at the time; that his fellow soldiers bound and gagged him to prevent disclosure of their presence to the enemy; and that Galloway was court-martialed as a result of the incident (R. 45–46).[2] The same witness testified that Galloway was on active duty in the Argonne drive on and after October 1, 1918 (R. 46, 49), and was "acting queer" (R. 46).[3]

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[2] The witness is evidently mistaken in thinking that Galloway was court-martialed as a result of anything which may have occurred in June 1918. The official records disclose no court-martial proceedings affecting Galloway during this enlistment, except for absence without leave in February 1918 (R. 121). The testimony of the witness Wells indicates that Galloway's offense in June was in starting a rumor that the Germans were coming, although Wells admits the lack of any personal knowledge of the incident (R. 36).

[3] The witness is evidently mistaken in thinking that the insured participated in the Argonne battle. The indication given at R. 46 that the American advance began September 26, 1918, corresponds with historical fact of which the Court may take judicial notice. But the official records show that Galloway was hospitalized for influenza from September 24, 1918, to January 3, 1919, at which time he was returned to active duty as "Class A" (R. 121). Moreover, it appears from Tanikawa's testimony that he had no recollection of the date when Galloway left his

The only additional evidence relating to the enlistment of the insured expiring on April 29, 1919, is the record in connection with his honorable discharge on that date. On the preceding day, he had been examined by a medical officer of the United States Army, who certified that he gave the insured a careful examination and found him physically and mentally sound. The insured's commanding officer likewise certified on April 28, 1919, that he did not know, nor had he any reason to believe, that the insured suffered from any injury or disease. The insured himself certified that he had no reason to believe that he suffered from the effects of any disease or injury, or that he had any disability or impairment of health (R. 121–122).

John O'Neill, who had known the insured since childhood (R. 16), and prior to service had worked with him intermittently in employment as a longshoreman (R. 27–28), testified that he also had known him after service in April 1919, and for a time thereafter. He saw him every day in 1919 (R. 18), but was not sure whether the insured worked during that year (R. 20), although he indicated the recollection that the insured did not work at the same place as the witness (R 23).

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battalion, and that he himself was wounded and left the organization, returning to this country "August 18" (R. 47).

The witness observed a marked change in the insured, who was "a wreck compared to what he was when he went away," talked nonsense, indulged in crying spells,[4] imagined that friends were enemies, got the idea that he was a friend of Grover Bergdoll and wanted to get in touch with him about a pot of gold that Bergdoll had hid (R. 17–18, 19). The witness considered that the insured's mind was "evidently unbalanced" (R. 17), although he would be all right "maybe a couple of days, maybe a couple of months" (R. 20). He testified that there were days when "evidently his mind would drift and he didn't care about his appearance and he would splabber around the mouth here and he didn't bother shaving or nothing" (R. 19–20). The witness was surprised that the insured was able to get into the Army and Navy (R. 20, 25).[5]

Extremely uncertain is the duration and extent of O'Neill's post-war contact with the insured. First fixing it as 5 or 6 or 7 years after 1919 (R. 16–17), during which "we were chums together all the time" (R. 17), it was then given as the witness' opinion that his contact extended over

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[4] He found the insured crying. "I said, 'What is the matter Joe?', and he said 'God damn it, I must be a Dr. Jekyll and Mr. Hyde'" (R. 19).

[5] The insured enlisted in the United States Navy on January 15, 1920, and served until July 8, 1920, and thereafter he reenlisted in the United States Army on December 7, 1920, and served until May 6, 1922 (R. 122, 124, 127).

a period of 5 years (R. 20).* He testified, however, that while he had heard that the insured had reenlisted, he did not have personal knowledge of either reenlistment. The witness later testified, "I can remember this now: That after he was away for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that * * * that would be around 1926 or so" (R. 29–30). The witness also testified, "I don't know just when or how often I seen him except when he first come home for the first couple of months" (R. 24).

It is clear that O'Neill, who remained in Philadelphia, had little, if any, opportunity to observe the insured between January 1920 and May 1922. The insured was absent serving in the United States Navy from January 15 to July 8, 1920, and in the United States Army from December 7, 1920, to May 6, 1922 (R. 122, 124, 127). He was in Detroit when he enlisted in the Army for the second time (R. 124. Whether he returned to Philadelphia and was observed by the witness during the time between these two periods of

* This testimony is in irreconcilable conflict with the witness' later testimony (R. 29–30) that the insured returned to Philadelphia in 1926 or so after an absence of 5 or 6 years. The direct conflict between these two items of testimony with respect to the dates of the witness' post-war observations, deprives both of evidentiary value; choice between them would be an unsupported guess. Cf. *United States* v. *Kiles*, 70 F. (2d) 880, 882–883 (C. C. A. 8).

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service (July to December 1920) does not clearly appear. Some time about 1920 or 1921, O'Neill testified, the insured was recalled to Philadelphia to testify for the prosecution in a criminal trial (R. 26).[1]

Commander Platt, an officer aboard ship with the insured during the period of his service in the Navy, testified that, by reason of leaving the ship without permission and not being amenable to discipline, the insured caused considerable trouble and that, after repeated warnings, he was sentenced by summary court martial for a bad-conduct discharge (R. 56–57). Records of the Navy Department show that he was absent without official leave for 11 hours on May 26, 1920, and likewise absent for 3½ hours and drunk on May 19, 1920. Punishment imposed by order of summary court martial for these offenses was, on the first occasion, loss of pay in the amount of $31.10 and deprivation of liberty on shore on a foreign sta-

[1] Possibly this visit of the insured is the one to which the witness referred when he suggested that the insured may have returned to Philadelphia about 1926 (R. 30) but "I wouldn't know nothing about dates on that" (R. 29). The several admissions of the witness concerning his lack of recollection of dates, coupled with his demonstrated lack of knowledge of the insured's post-war activities, clearly deprive the testimony of the witness of any probative value whatever with respect to the period between 1922 and 1930 and greatly impair the probative value of his testimony with respect to any period except possibly the first few months after the insured's discharge on April 29, 1919. Cf. *United States* v. *Niles*, 70 F. (2d) 880, 882–883 (C. C. A. 8).

tion for one month and, on the second occasion, loss of pay in the amount of $144 and a bad-conduct discharge, the latter remitted subject to six months probation (R. 124). It is inferable that he violated the probation since, although no explanation for it appears, he was given a bad conduct discharge from the Navy on July 8, 1920 (R. 122).

Dr. George F. Klemann testified that, as a lieutenant in the Medical Corps of the United States Naval Reserve, he examined the insured prior to that discharge; that he found no evidence of mental or physical defects; that it was his practice to record any mental defects noticed; and that he made no such notation (R. 114–117).

On December 7, 1920, the insured again enlisted in the Army (R. 124). Upon medical examination at that time no abnormality was noted and he was passed by the examining physician as mentally and physically qualified for Army service (R. 125–126). Army records reflect that, in January 1921, he appeared on the street drunk and disorderly and was sentenced by summary court martial to confinement at hard labor and forfeiture of two-thirds pay for one month (R. 126).

For a number of months following this enlistment, the insured was at Camp Travis, Texas, serving directly under Sergeant Earl Shipp, who testified that the insured drank but not while on duty; that his general conduct appeared to be

that of a normal person, there being nothing to indicate that he might be insane; that he took orders and performed duties as a regular soldier (R. 110–111); that he was dependable; that he was not "out of tune" with things; and that he was not contentious (R. 112–113).

Lieutenant Colonel James E. Matthews, then the company commander under whom the insured served during the period mentioned in the preceding paragraph, testified that he once intended to make the insured a corporal because of his familiarity with military accomplishments and his ability to handle men, but later found it necessary to discipline him and concluded that he could not be depended upon (R. 73). This witness identified his signature on the Army record of punishment for drunkenness and disorderly conduct in January 1921, referred to above (R. 74), and further testified that the insured apparently drank considerably, was "what we called a bolshevik," did not seem to be loyal, and acted as if he were not getting a square deal. "I thought at that time he was a moral pervert and probably used narcotics. He was one of three men in my entire experience that I could not appeal to. I decided that he was not a desirable soldier, but I could not get enough on him to have him tried and awarded a dishonorable discharge" (R. 73).

This witness further testified that, after serving the sentence imposed upon him in January 1921,

the insured returned to duty in his organization and remained until he was transferred to Camp Benning (R. 74) during the summer of 1921 (R. 73). During these remaining months of service, Colonel Matthews testified, the circumstances were such that he had opportunity to observe the insured frequently; that insured had periods of exhilaration and gaiety, apparently due to liquor or drugs, followed by periods of depression, "as if he had a hangover" (R. 75, 79); that he talked incoherently upon occasions when he was drunk (R. 78–79, 82); that "At times he was one of the very best soldiers I had. * * * At other times I could not depend on him. He would be absent from reveille, for instance" (R. 78; cf. R. 82, 83); that he obeyed orders without apparent resentment, although more cheerfully upon some occasions than upon others; that he got along very well with his fellow soldiers (R. 79); that except for one or more occasions when he appeared to be under the influence of liquor or drugs, he appeared to be able to do his work (R. 80); and that, aside from such occasions, he caused no trouble (R. 82).

Colonel Matthews testified that attempts to obtain proof that the insured was addicted to the use of drugs were unsuccessful (R. 74, 79–80), but that "He acted just like I had noticed other men that I know to be addicts to drugs. * * * The pupils of his eyes appeared to be dilated. He nor-

mally was bright and intelligent, and when you would question him he would not answer the same way" (R. 80). "I am not an expert on insanity. I have been around some insane persons and have had to on one or more occasions be responsible for persons who were violently insane, and from what experience I have had from insanity, he just did not have the actions of these insane persons with whom I am familiar" (R. 81). "As I remember the case and observing him today under the same conditions, after these additional years of experience, I do not believe I would conclude he was suffering from insanity" (R. 75). "I did not consider the man insane in any respect" (R. 81).

The insured was transferred from the command of Colonel Matthews sometime during the summer of 1921 (R. 73), and thereafter, on August 6, 1921, he was absent without official leave and was dropped as a deserter. He surrendered to military authorities in California on November 1, 1921, and on November 28th was restored to duty without trial and transferred to the Coast Artillery Corps (R. 126). On February 15, 1922, the insured, found upon trial by summary court martial to have "behaved in disorderly and disgraceful manner while detailed as a member of a firing squad", was sentenced to lose two-thirds' pay for two months (R. 126).

On May 6, 1922, the insured was absent without official leave, and three days later was dropped as a deserter (R. 127).

Lieutenant Colonel Albert K. Mathews, an Army Chaplain, testified that he saw a soldier named Joseph Galloway at Fort MacArthur, California, during the early part of 1920 (at which time the insured was not in the Army (R. 56–57, 122–124)). His observation extended over a period of six weeks, during which the soldier concerning whom he testified, was a hospital patient under observation for mental disorder and a prisoner under charges of desertion or absence without leave; the patient-prisoner seemed mentally deranged because he was usually abnormally depressed; appeared mentally exhausted, and would "excitedly launch into a discussion of what, to his understanding, was discrimination on the part of the military authorities in failing to give him a disability discharge, it was with difficulty that I could divert his mental processes during these conversations" (R. 50). This witness further testified that the patient-prisoner seemed to show no interest in Army life in general, or in anything other than his own claim; that he identified the patient as an "egocentric," and his condition as "monomania" (R. 51); and that he regarded him as irrational and as of unsound mind (R. 53, 56).

The witness frankly admitted that he could not identify the person to whom his testimony referred (R. 54) and, whereas he described a soldier "patient-prisoner in the Station Hospital at Fort MacArthur" (R. 55) "in the early part of 1920" (R.

55), who was under charges either of absence without official leave or of desertion (R. 50), petitioner's own evidence shows that, in the early part of 1920, the insured was serving in the Navy aboard the *Olympia* (R. 56–57; see also Navy records, R. 122–124).

Official Army records (the Government's evidence) show that the insured was at Fort MacArthur for a time in 1922, but petitioner does not seek to draw from them an inference that the chaplain may have observed the insured in 1922. Presumably petitioner felt precluded from any such transposition of dates because these official records show the insured not to have been either hospitalized or imprisoned, or to have been under charges of unauthorized absence during that period (R. 126–127). While the insured's services at Fort MacArthur terminated by desertion (R. 127) it appears that he was not thereafter returned to that station. Significant also in this connection is the fact that Chaplain Mathews specifically testified that he had furnished an affidavit or deposition to the family at the time the patient observed by him was "released from the service" (R. 53). It is undisputed and officially certified that the insured deserted and in 1940 was still carried on the rolls as a deserter at large (R. 120). On cross-examination, Chaplain Mathews was apprised that the insured was not at Fort MacArthur in 1920 (R. 53), and redirect examination of him was obviously

designed to elicit an admission that he may have been mistaken as to the date of his observation of the soldier described in his testimony. Yet, while conceding that error was possible, he nevertheless, with regret that he could not help counsel, reaffirmed, "the early part of 1920 is the best of my recollection" (R. 55).*

The record is entirely barren of evidence to show physical or mental disability during the eight years between 1922 and 1930. The insured's activities and earnings during those years are likewise not shown, nor is there any disclosure of the existence, at any time, of any source of income on the part of the insured other than earnings. It is definitely established that the insured married petitioner on February 14, 1929 (R. 119), but petitioner did not testify at the trial. Perhaps the insured corresponded with

* The courts below were entitled to disregard entirely the testimony of Chaplain Mathews on the ground that the time and place to which it related, and the circumstances of the person whom it concerned, provided no basis for any reasonable inference that it related to the insured; indeed, the evidence appears to preclude any such inference. The circumstances are such that an inference of identity of person by reason of identity of name obviously cannot be indulged. It is a matter of common knowledge and therefore, we submit, subject to judicial notice, that many persons have identical names. (The frequency of repetition of any particular combination of names like that of "Joseph Galloway" may be ascertained from any large index such as that maintained by the Veterans' Administration with respect to former service men.)

the witness O'Neill during the years from 1922 to 1930 (R. 28).

A series of medical examinations of the insured was made by Veterans' Bureau doctors beginning on January 13, 1930. On that date findings were negative for syphilis (R. 84). On May 19, 1930, his condition was diagnosed as "Moron, low grade", and observation for dementia praecox, simple type, was recommended (R. 85). Further tests for syphilis, made two days later, were negative (R. 85). On November 16, 1931, an examination at a Veterans' Administration hospital resulted in a diagnosis of "Psychosis with other diseases or conditions (organic disease of the central nervous system—type undetermined)" (R. 85–91). Petitioner was appointed guardian of the insured on February 11, 1932 (R. 15). Further examination on July 30, 1934, resulted in the following diagnoses (R. 93).

> Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild.

Dr. E. M. Wilder testified, as an expert witness* for petitioner, that in August 1941 and thereafter (R. 62, 100) he examined the insured

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*Dr. Wilder disclaimed any designation as a specialist in mental diseases (R. 100). However, his wide experience as a witness includes frequent qualification as an expert in psychiatry (R. 60, 100–101).

several times for the purpose of preparing the testimony to be given at the trial, and found that he was suffering from dementia praecox, schizophrenic branch. Regarding the insured's condition at the time of trial, and with respect to the question as to whether at that time insured was able to appear as a witness, the doctor testified to an opinion that he was insane; "I don't think that you could depend upon what he told you"; "he doesn't understand the impact of the outside world on his interests or any interest of any kind, he is likely to tell you anything" (R. 62; see also R. 63).

Upon the testimony of O'Neill regarding the insured's condition in 1919, Dr. Wilder testified to an opinion that the insured had then lost interest in the effect of the outside world upon him (R. 63); that he had a tendency to delusions of persecution (R. 64); that he had abandoned all interest in his relations with the outside world; that his personality was so changed that he devoted all his thoughts to himself and was indifferent to everything (R. 65); (and quite evidently making factual assumptions from other sources than O'Neill's testimony) that he was apparently normal until he went to France, when he began to go to pieces (R. 66); that in the spring of 1919 he was still suffering from the acuteness of the break-down, with more emotional disturbance over longer periods than he has now; that he is

still going downhill, but it began with the breakdown; and that "His conduct was something that no man who hasn't lost his regard for the outside world's impact upon him is going to do, to black their officers' eyes, and curse them, and so forth" (R. 66).

Dr. Wilder testified to an opinion that the incident on the Marne River when the insured shouted that the Germans were coming was an example of emotional instability, which is "part of the picture" (R. 67), and to the further opinion that the soldier described by Colonel Albert K. Mathews, the chaplain, had manifested delusions of persecution and loss of interest in the outside world (R. 67–68). This witness further testified to an opinion that the insured's condition in 1921, as described by Colonel James E. Matthews, indicated a loss of interest in anything, military or otherwise (R. 69).

Upon the basis of all of the evidence adduced by petitioner, Dr. Wilder testified to an opinion that the insured was insane in June 1918, in April and May 1919 (R. 96–97), in the spring of 1920[10] (R. 98–99), and the spring of 1921 (R. 98; cf. R. 72). Finally, this witness testified to an opinion that at all times since July 1918, at least, the insured "has been insane to the point

[10] As to this date, the basis of the doctor's opinion was the testimony of Chaplain Albert K. Mathews, in which, as above shown, there is a lack of identification of the subject of observation. See footnote 8, *supra*, p. 21.

that he was unable to adapt himself * * * speaking from an occupational standpoint" (R. 99). He further explained, however, that he thought that persons such as the insured, suffering from dementia praecox, could do routine work pretty well if not "subjected to pressure from the outside" (R. 95, 98).

On cross-examination, Dr. Wilder testified that he regarded the insured's condition in 1930 to be "very well fixed by the Government's Veterans examination", and that information regarding the years from 1925 to 1930 was not essential to the opinions he had testified to, although he conceded that his conclusions would be a great deal different on the assumption that the insured had worked regularly from 1925 to 1930 (R. 101–102).

II. IT WAS THE DUTY OF THE DISTRICT COURT TO DIRECT A VERDICT FOR THE GOVERNMENT IN THE ABSENCE OF SUBSTANTIAL EVIDENCE TO SUPPORT A VERDICT FOR PETITIONER

The body of law prescribing the duties of a trial judge with respect to the direction of a verdict in a jury trial in a federal court is clear and well established. In *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, it is pointed out at p. 384 that both the court and jury are essential factors in such a trial, the former to direct and supervise and the latter to determine issues of fact. In the same opinion, at p. 369, it is stated:

> * * * when, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the

> inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.

See also: *Gunning* v. *Cooley*, 281 U. S. 90, 93–94; *Southern Railway Co.* v. *Walters*, 284 U. S. 190, 194; *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343; *Baltimore & C. Line* v. *Redman*, 295 U. S. 654; Rule 50 (b), Federal Rules of Civil Procedure.

In two recent cases, involving the review of administrative determinations, the subject of substantial evidence was considered. *Edison Co.* v. *Labor Board*, 305 U. S. 197, 229; *Labor Board* v. *Columbian Co.*, 306 U. S. 292, 300. Mr. Chief Justice Hughes stated in the former:

> Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989; *National Labor Relations Board* v. *Thompson Products*, 97 F. 2d 13, 15; *Ballston-Stillwater Co.* v. *National Labor Relations Board*, 98 F. 2d 758, 760. * * *

And, in the latter, the present Chief Justice said:

> Substantial evidence is more than a scintilla, and must do more than create a suspi-

> cion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," *Consolidated Edison Co.* v. *National Labor Relations Board, supra*, p. 229, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

With respect to the procedural situation in the instant case, in which the trial court directed a verdict for the defendant and the Circuit Court of Appeals affirmed the judgment based upon that directed verdict, the discussion in *Patton* v. *Texas and Pacific Railway Co.*, 179 U. S. 658, 660, is apposite:

> * * * the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court,

> this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

There have been a number of decisions by this Court applying, in cases involving contracts of war-risk insurance, the long-established principles governing the disposition of a motion for a directed verdict. *Lumbra* v. *United States*, 290 U. S. 551; *United States* v. *Spaulding*, 293 U. S. 498; *Miller* v. *United States*, 294 U. S. 435; *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed, without opinion, 291 U. S. 646; *Berry* v. *United States*, 312 U. S. 450; and *Halliday* v. *United States*, 315 U. S. 94.

It was held in each of the two cases last named that the trial court properly denied the Government's motion for a directed verdict, whereas in each of the other cases cited it was held that a directed verdict was properly granted or improperly refused. Petitioner, referring only to these two of the foregoing cases, appears to assume, solely because the application of established legal principles in the decision of the *Berry* and *Halliday* cases led to the conclusion that a directed verdict was properly denied, that the principles

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[11] See application of this rule in *Brown* v. *Capital Transit Co.*, 127 F. (2d) 329, 330 (App. D. C.). And compare *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed, 291 U. S. 646; *Miller* v. *United States*, 294 U. S. 435.

announced by this Court in the preceding war-risk cases have been abandoned.

There is obviously no justification for this view either upon the ground of departure from the substantial evidence rule generally,[11] or of differentiation in the decision of war-risk insurance cases. See *United States* v. *Still*, 120 F. (2d) 876, 880–881 (C. C. A. 4), certiorari denied, 314 U. S. 671. Cf. *Pence* v. *United States*, 121 F. (2d) 804 (C. C. A. 7). It has been recognized by the courts generally, of course, that veterans' cases involve an element of sympathy not always present in other litigation;[12] that the relationship of the Government to soldiers, if not "paternal," is at least "avuncular" (*White* v. *United States*, 270 U. S. 175); but it has also been recognized that a claim must have been fully-canvassed by the Veterans' Administration and (jus-

[11] The substantial evidence rule is so well established and understood, and so uniformly applied, that failure of restatement, or departures in phraseology, are construed as connoting no change in the rule to be applied. As this Court said in the *Edison Co.* case, *supra*, at p. 229: "We do not think that the Court of Appeals intended to apply a different test. In saying that the record was not 'wholly barren of evidence' to sustain the finding of discrimination, we think that the court referred to substantial evidence."

[12] In these insurance cases brought by soldiers, every sympathy of the jury is with the plaintiff, and it is particularly imperative that the trial judge observe a scrupulous detachment." *Mason* v. *United States*, 63 F. (2d) 791, 793 (C. C. A. 2). And see also the cases cited in footnote 15, *infra*.

tification for payment not being discovered) must have been denied upon its merits before suit is brought at all."[*] And the courts, differentiating insurance claims, founded on contracts, from gratuities such as pensions and compensation, have uniformly held the former to the established standards of adjudication in the federal courts. Thus, it was said in *United States* v. *LeDuc*, 48 F. (2d) 789, 793 (C. C. A. 8):

> After all, the right of recovery in these war risk insurance cases is dependent on contract, and it is not within the province of the jury to award from the public funds gratuities to relatives of deceased ex-soldiers; neither can we, under the guise of liberal construction, close our eyes to the undisputed facts disclosed by the record in this case and sustain this verdict on the theory of a constructive, permanent, total disability, which finds support only in a series of superimposed retroactive presumptions."

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[*] "In other words, there must be a disagreement between the claimant and the government as to the merits of the claim before a suit may be instituted." *Burgett* v. *United States*, 80 F. (2d) 151, 153 (C. C. A. 7). See Section 19, World War Veterans' Act (38 U. S. C. 445 and 445d).

See also: *Blair* v. *United States*, 47 F. (2d) 109, 111 (C. C. A. 8); *United States* v. *McGivory*, 63 F. (2d) 697, 700 (C. C. A. 1), certiorari denied, 289 U. S. 742; *United States* v. *Clapp*, 63 F. (2d) 793, 795–796 (C. C. A. 2); *United States* v. *Montrose*, 60 F. (2d) 488, 489 (C. C. A. 10); *Live Stock National Bank* v. *United States*, 122 F. (2d) 179, 180 (C. C. A. 7), certiorari denied, 315 U. S. 802; *United*

III. THE RECORD SHOWS A LACK OF SUBSTANTIAL EVIDENCE TO SUPPORT A VERDICT FOR PETITIONER

A. *There is no substantial evidence that any mental disability that might have existed while insurance was in force was then totally disabling, if, indeed, there is any substantial evidence that any mental disability then existed*

Insurance protection expired May 31, 1919. Mental disability was first diagnosed in 1930. Petitioner seeks to have it inferred that the mental disorder diagnosed in 1930 existed in 1919; that the mental disorder thus inferred was totally disabling in 1919; and finally that the inferred total disability from the inferred mental disorder was then permanent in all its totality. Unless the record shows substantial evidence supporting all these inferences the district court's direction of the verdict was clearly correct.

The Government contends that if it be assumed that a mental disability existed in 1919, an assumption resting, we submit, on speculation or conjecture rather than upon inference, there is nevertheless no substantial evidence that any such assumed disability was then totally disabling. As warranting an inference of the existence in May 1919 of the mental disorder first diagnosed in 1930 petitioner relies entirely upon isolated instances of abnormal conduct drawn from long periods during which the insured was otherwise

States v. Crain, 63 F. (2d) 528, 531 (C. C. A. 7); *Hanagan v. United States*, 57 F. (2d) 860, 861 (C. C. A. 7); *United States v. McCreary*, 61 F. (2d) 804, 808 (C. C. A. 9).

pursuing normal activities."[16] Such isolated instances may be regarded as affording substantial evidence of a then existing mental disorder only if they are more consistent with that hypothesis

[16] The insured, whose pre-war activities were those of a completely normal longshoreman, enlisted in the Army in November 1917 and served without incident until the middle of April 1918; the disturbance then occurring at Aizonville, was followed by approximately two months of uneventful active service before the incident on the Marne one evening under circumstances of strain. Notwithstanding that incident the insured continued regular active service until his hospitalization for influenza, whereupon he came under close medical supervision for over three months without observation of any tendency toward abnormality, and thereafter again served without incident until his discharge April 29, 1919, approximately one month before the insurance lapsed, at which time he was found on medical examination to be physically and mentally sound and both he and his commanding officer certified that they had no reason to believe that he was suffering from any wound, injury, or disease.

O'Neill's testimony may be regarded as reflecting abnormal conduct in April and May 1919. Giving full credit to that testimony it may not, we submit, be regarded as providing the basis for an inference of abnormality with respect to any other period. (See *supra*, pp. 12–14.)

The remainder of the evidence relied upon as reflecting abnormal conduct relates to periods subsequent to the expiration of insurance protection. There is no evidence that the insured did not support himself at all times between 1919 and 1930, although the only periods as to which evidence was furnished related to periods of service as a sailor (January to July 1920) and as a soldier in the armed service of the United States (December 1920 to May 1922). There is no evidence that his conduct reflected anything other than normal activities essential to self-support between June and December 1919, July and December 1920, and May 1922 to

than with any other." Colonel Matthews, insured's commanding officer during a substantial portion of his second army enlistment, advanced another hypothesis—namely, that insured was a heavy drinker and probably was using narcotics [16]

January 1930. During the last-named period of eight years the only evidence discloses that the insured married February 14, 1929 (R. 119).

There is in this extremely sketchy record no such continuity in the manifestations of abnormal conduct as that which has been held sufficient to establish the existence during insurance protection of mental disorder subsequently diagnosed. *Cf. Halliday* v. *United States*, 315 U. S. 94, 96–97.

[15] Evidence equally consistent with conflicting hypotheses will not support a verdict based on either. *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 343. For applications of this proposition to war risk insurance cases see *Eggen* v. *United States*, 58 F. (2d) 616, 620 (C. C. A. 8); *United States* v. *Barry*, 67 F. (2d) 763, 765 (C. C. A. 6), certiorari denied, 292 U. S. 648.

[16] "It was my opinion that he was doping or drinking to excess" (R. 78).

For evidence as to insured's drinking see R. 73, 75, 111, 124, 126.

Colonel Matthews based his suspicion of the use of narcotics upon substantial experience with dope fiends (R. 74). He observed in the insured physical symptoms—dilation of the pupils of the eyes (R. 80)—which corresponded to those described by petitioner's expert, Dr. Wilder, as being indicative of the use of morphine (R. 70). Upon the question of insured's use of drugs Dr. Wilder took pains to limit his response to an opinion that he was not addicted to drugs at the time of trial, disclaimed ability to judge whether there might have been previous addiction, and explained that if an addict is deprived of a drug "until he gets clear of it" resumption of use is induced merely by association with others using it (R. 71).

(R. 73), with which the evidence is equally if not more consistent.[19]

From these isolated instances, petitioner attempts to draw inferences supporting the hypothesis relied upon by means of the "long range retroactive diagnosis" of Dr. Wilder. Cf. *United States* v. *Hill*, 62 F. (2d) 1022, 1025 (C. C. A. 8); *United States* v. *Hansen*, 70 F. (2d) 230, 231 (C. C. A. 9), certiorari denied, 293 U. S. 604; *United States* v. *Becker*, 86 F. (2d) 818, 820 (C. C. A. 7). Dr. Wilder, however, testified that these isolated instances of nonconformity, considered simply for what they themselves show, were of no diagnostic significance—"do not constitute a symptom

[19] Much of the evidence is inconsistent with the hypothesis relied upon by petitioner—(1) the numerous and lengthy periods of time during which the insured is either shown to have pursued normal activities or is not shown to have manifested any abnormal conduct (see footnote 16, *supra*, pp. 32–33); (2) the absence of any official notation of mental or nervous disorder on the part of the insured by any of his commanding officers during any of his several periods of service; (3) the absence of notation of mental or nervous disorder upon any of a number of physical examinations or at any time during a three months period of hospital treatment for influenza; (4) the marriage of the insured in 1929.

All the foregoing evidence, however, is entirely consistent with the hypothesis that the isolated instances of abnormal conduct on the part of the insured may have been the result of excessive drinking or of drug addiction, or of unusual stress.

The insured was punished for drunkenness in service (R. 73, 126) and all the disciplinary action taken against him during his several periods of service is consistent with the hypothesis that his misconduct (R. 121, 124, 126–127) re-

complex of schizophrenic insanity" (R. 107). He attributed significance to them only by assuming a course of development that is utterly without foundation in the evidence. Dr. Wilder assumed that the O'Neill testimony described a continuous condition from insured's discharge until 1925 (R. 97, 101) although O'Neill was without personal knowledge that in the three years immediately following discharge insured had served in the Army or Navy (R. 25) approximately 23 months (R. 122–126), admitted "I don't know just when or how often I seen him except when he first come

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sulted from addiction to intoxicants. In this connection it is significant that the first infraction of discipline—absence without official leave—occurred in February 1918 (R. 121) at a time when according to all of the pertinent testimony (R. 42, 43, 66) (including the opinion of Dr. Wilder) he was mentally normal. The testimony of the witness Weils with respect to the incident in April 1918 (R. 32, 36, 39–41) is likewise consistent with the hypothesis suggested by Col. Matthews.

The condition of the insured in April and May 1919 as described by the witness O'Neill is not inconsistent with a condition resulting from excessive and prolonged drinking.

The testimony of the witness Tanikawa with respect to the incident described by him as occurring on the Marne in June 1918 fits less readily into the hypothesis that it may have resulted from drinking or the use of drugs, since it seems unlikely that the insured would have had ready access to either. The facts, however, that this incident—occurring under circumstances of unusual stress—did not interrupt the insured's active service as a soldier and is not even reflected in the official record, establish that it was not contemporaneously regarded officially as a manifestation of mental disorder.

home for the first couple of months" (R. 24), and fixed the termination of his association with insured at insured's drifting "out West somewheres around California" (R. 20); insured's second army enlistment terminated in California in 1922 (R. 127) and there is no definite indication that he ever returned to Philadelphia thereafter. The Doctor assumed that the condition described by O'Neill made it impossible for him to hold a job (R. 97, 101), whereas O'Neill specifically testified that he did not know whether insured was working in 1919 following his discharge (R. 20). He further assumed with no foundation in the record that insured's earnings were limited over a period of 20 years (R. 101), that he was never able to hold any kind of a job after his return from the War (R. 97)[20] and that there had been "the same recurring thing in one form or another over a period of twenty years" (R. 107–108). The crucial importance of these assumptions is indicated by the Doctor's testimony that his diagnoses might be quite different if it were known that insured was working regularly from 1925 to 1930 (R. 102)[21] and that diagnoses based on the incidents

[20] This, of course, is substantially the point at issue in the litigation. Expert testimony based on such an assumption is devoid of probative value. *United States* v. *Koskey*, 71 F. (2d) 501, 502 (C. C. A. 9).

[21] In other instances, also, the doctor disclosed that he was testifying from a general impression rather than with reasonable attention to the evidence upon which he was asked to base an opinion. Thus testimony that, immediately after

preceding the lapse of insurance would be impossible without the subsequent history (R. 102–103).

If, however, notwithstanding these very substantial impediments to an inference that any mental disorder existed prior to the expiration of insurance protection on May 31, 1919, it be assumed that all conduct shown by the record involving any departure from normal behavior constituted recurring manifestations of then existing dementia praecox, such manifestations do not, in any event, constitute substantial evidence of total disability in that period.[22] The insurance policy

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his return from service in May 1919, the insured was wearing his uniform and a decoration from the division in which he had served, was construed as showing slovenly dress (R. 63). Consider also the assumption that a mental disease had originated in 1918 and had existed continuously thereafter (R. 101), although there was no proof whatever that it had existed, or at least that it had not been in a state of remission for many years prior to 1930. Dr. Wilder assumed that the insured cursed his officers and blacked the eye of one of them, and attributed considerable significance thereto (R. 66). It is at best very doubtful that even this assumption is supported by the evidence (R. 41). As to the inferences to be drawn therefrom regarding insured's disposition, compare the testimony of Colonel James Matthews (R. 79) and of Sergeant Shipp (R. 113).

[22] The evidence covers the period extending from 1918 to 1922. The evidence relating to the period of insurance protection includes only the Aizonville and Marne incidents, which did not interrupt the insured's active service, and some part of the testimony of O'Neill. To establish total permanent disability petitioner must, of course, show total disability occurring before the expiration of insurance protection, continuously existing to the time of determination and reasonably certain to continue for life.

held by the insured does not mature upon the occurrence of a partially disabling condition which develops into a total-permanent disability after the expiration of insurance protection. It does not insure against the incipience of injury or disease later causing total permanent disability or death but only against death or total permanent disability while the insurance is in force. *United States* v. *Spaulding*, 293 U. S. 498, 504–505; *Wilks* v. *United States*, 65 F. (2d) 775, 776 (C. C. A. 2).

That insured was not totally disabled during the period covered by the evidence appears conclusively from the undisputed facts contained in the record. With no recorded interruptions resulting from the Aizonville and Marne incidents the insured served out his period of enlistment as a regular soldier both during the period of active hostilities and thereafter, manifesting no disability other than influenza. In April 1919 he was honorably discharged after medical examination which found him to be physically and mentally sound and upon his and his commanding officer's certification that they neither knew nor had any reason to believe that he was suffering from any impairment. There is no indication that he had any unearned source of livelihood for the remainder of the year 1919, and O'Neill's observations clearly were not indicative of disability inconsistent with the pursuit of insured's occupation as longshoreman,

since O'Neill testified that he did not know whether insured was working or not. In January 1920 the insured was examined for acceptance in the United States Navy, enlisted, and, although presenting some disciplinary problems, apparently performed all the regular duties of a sailor until July of that year. Thereafter there is again no showing that he was unable to, or did not in fact, earn his living by his own activities until December 7, 1920, when he was again medically examined, found to be physically and mentally fit for service in the United States Army, enlisted, and served continuously as a soldier until May 1922. During this period of service it appears not only that he performed the regular duties of a soldier in the United States Army, but that he performed them well. The record includes the testimony of the officer immediately in charge of the insured, who probably knew more about the quality of his service than anyone else. This officer, Sergeant Shipp, testified that while the insured drank he did not drink on duty; that he appeared to be a normal soldier; that he took his orders and did his duty as a regular soldier; that he was dependable (R. 111–113). Both Sergeant Shipp and Colonel James Matthews, the insured's company commander, were questioned as to whether they had any reason to suspect that the insured might be insane. They both denied very positively that they ever had any grounds for entertaining such

a suspicion and both indicated that insured got along well with his fellow soldiers (R. 75, 79, 111–113).

Insofar as Dr. Wilder's testimony expressing a conclusion of the existence since 1918 of insanity to the point of occupational inadaptability (R. 99; see also R. 95, 98) may be relied upon as a foundation for an inference conflicting with the ability to perform the very substantial regular service in fact performed, it may be completely eliminated upon the ground stated by this Court in *United States* v. *Spaulding, supra* at p. 506:

> As against the facts directly and conclusively established, this opinion evidence furnishes no basis for opposing inferences.[23]

B. *There is no evidence of the permanence of total disability as of May 31, 1919*

Even if it be assumed not only that the insured, prior to May 31, 1919, manifested dementia praecox, but also that the disease was then totally disabling, there is nevertheless a fatal deficiency in petitioner's case by reason of the failure to pre-

[23] In addition, it may be noted that Dr. Wilder's opinion was expressed only upon petitioner's evidence and before defendant's case had been introduced; of course in its ultimate conclusion it is subject to the same infirmities which have been set forth *supra* (pp. 34–37) with respect to the question of whether the doctor's testimony affords any basis for inferring the existence of any mental disorder occurring before the expiration of insurance protection.

sent any evidence regarding the insured's condition over a period concededly embracing five years (R. 101) and actually, as may be shown upon analysis,[24] extending for a period of eight years. Under the contract upon which petitioner sues it is not enough that there be a showing of total disability while insurance is in force even though caused by an incurable disease; permanence of totality must be shown. This requires a showing that total disability occurring while the contract was in force was then reasonably certain to continue and did in fact continue to the date of determination. *Personius* v. *United States*, 65 F. (2d) 646 (C. C. A. 9); *Denny* v. *United States*, 103 F. (2d) 960 (C. C. A. 7). Cf. *Ginell* v. *Prudential Ins. Co.*, 237 N. Y. 554; *Hawkins* v. *John Hancock Inc. Co.*, 205 Iowa 760. Obviously this requirement cannot be met upon a record which, with respect to the period 1922 to 1930, shows only that insured married the petitioner during that time.

If the insured had dementia praecox prior to May 31, 1919, it was obviously and admittedly in its earliest stages and it is not shown to have reached the stage of medical diagnosis of any mental disorder prior to 1930, eleven years later (R. 84–94). Dr. Wilder, petitioner's expert medical witness, who expressed the opinion that the insured's present condition began in 1918, testified

[24] See *supra*, pp. 12–14.

that he was still going down hill in 1941 (R. 66). Yet Dr. Wilder did not express an opinion that the condition was permanent as of any date earlier than 1941, and his testimony even with respect to 1941 recognized a possibility, though not a probability, of recovery through the application of newly developed treatments (R. 109).

It is a well-known fact, recognized in a number of cases, that dementia praecox is subject to periods of remission during which a person may live a normal life and pursue normal activities. *United States* v. *Gwin*, 68 F. (2d) 124, 126 (C. C. A. 6); *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4), certiorari denied, 291 U. S. 658; *Grant* v. *United States*, 74 F. (2d) 302, 303 (C. C. A. 5), certiorari denied, 295 U. S. 735; *Atkins* v. *United States*, 70 F. (2d) 768 (App. D. C.); *Denny* v. *United States*, 103 F. (2d) 960, 964 (C. C. A. 7). See also *United States* v. *Cochran*, 63 F. (2d) 61 (C. C. A. 10). Compare: *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8). Assuming that the testimony of O'Neill, Wells, and Tanikawa warrants an inference that Galloway suffered during the life of the contract from dementia praecox rather than the effects merely of recurring periods of excessive drinking or of drug addiction, the evidence is nevertheless consistent only with the view that he was achieving progressively lengthening periods of remission during the period of more than a decade thereafter. It is the theory of petitioner's case that in 1919 the insured was in

the acute phases of break-down (R. 66), and there was testimony indicating that the longest periods of remission were "a couple of months" (R. 20). The undisputed fact that in less than two years thereafter the insured performed eight months of satisfactory service as a soldier under Sergeant Shipp shows a continuance by geometric progression of the lengthening of the periods of remission. No reversal of this process is shown prior to 1930 and its continuance is indicated by the marriage of the insured in 1929.

It was recognized in *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9), affirmed without opinion, 291 U. S. 646, that a verdict should be directed for the United States in a suit on a contract of war risk insurance where the evidence showed total disability during the life of the contract and proof of subsequent total permanent disability, but proof was lacking of the permanence of total disability while the contract was in force. This interpretation of the policy has been applied in the decision of numerous cases antedating and following the *Falbo* decision. *Eggen* v. *United States*, 58 F. (2d) 616 (C. C. A. 8); *United States* v. *Clapp*, 63 F. (2d) 793 (C. C. A. 2); *United States* v. *Elmore*, 68 F. (2d) 551 (C. C. A. 5); *United States* v. *Rentfrow*, 60 F. (2d) 488 (C. C. A. 10); *United States* v. *Russian*, 73 F. (2d) 363 (C. C. A. 3); *United States* v. *Sumner*, 69 F. (2d) 770 (C. C. A. 6); *United States* v. *Baker*, 73 F. (2d) 455 (C. C. A. 4); *United States* v. *Clements*, 96 F.

(2d) 533 (App. D. C.), certiorari denied, 305 U. S. 610; *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8).

It was thus incumbent upon petitioner to make some showing of what the insured's condition and activities in fact were from 1922 to 1930. This is part of the burden of making a case upon which a jury can pass. To render a verdict the jury would have to conclude that he was or was not totally disabled over that entire period, and in the absence of evidence any conjecture as to whether he was or was not working, or was or was not able to work, would be the wildest sort of guess. If any inference can be drawn from the one fragment of evidence relating to the period, namely that insured married the petitioner, the inference would necessarily be adverse to petitioner; she was clearly in a position to testify from the closest personal association what insured's condition was at least at the time of marriage and thereafter, yet she did not take the stand.

IV. CONTRARY TO PETITIONER'S CONTENTION, THE DECISIONS BELOW ARE COMPLETELY IN ACCORD WITH THE DECISIONS IN BERRY *v.* UNITED STATES, 312 U. S. 450, AND HALLIDAY *v.* UNITED STATES, 313 U. S. 94

The decisions of this Court in the *Berry* and *Halliday* cases, as in the earlier war risk insurance cases of *Falbo* and *Miller* (*supra* p. 28), and the decision of the Circuit Court of Appeals in the present case, are in harmony with the rule stated in the *Patton* case (*supra* pp. 27–28) that great re-

spect must be paid to the ruling by the district court upon a motion for a directed verdict. The instant case, like the *Falbo* and *Miller* cases and unlike the *Berry* and *Halliday* cases, invokes the additional consideration enunciated in the *Patton* case, that, "if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

Factually, the present case and *Berry* v. *United States* have no elements in common providing a basis either for contrast or for comparison that would substantially aid in the determination of the question here presented. Certainly the disabilities involved in the two cases are widely different in nature, and hence the character of the evidence offered also differs widely.

The variation is such, we believe, that considerations wholly different from those involved in the *Berry* case determine the probative value of the evidence herein. In the *Berry* case, there was no question, as here, regarding the probative value of opinion testimony, necessitating consideration of the factual foundation for it and its inconsistency with established facts. Neither was there, in the *Berry* case, occasion to consider whether permanency of the disability was shown, and thus to determine the character of proof required to show permanency. Here it is urged that the lack of proof of permanency of any total

disability that might have existed during the life of the policy is, in itself, a fatal deficiency in petitioner's proof.

The present case and *Halliday* v. *United States*, however, have a number of factors in common so that this Court's decision in the one may properly be drawn upon in solving the problem in the other. We submit that in each pertinent particular the evidence in the present case differs from that in the *Halliday* case and that, accordingly, because of the absence here of evidence of the character upon which the decision was based in the *Halliday* case, the two cases present a contrast adverse to petitioner's contentions and favorable to the result reached by the courts below.

In the *Halliday* case, opinion testimony regarding the insured's disability while his insurance was in force was given by a medical expert who, as the family physician, had known the insured from infancy and who had opportunity to observe him both while the insurance was in force and at frequent intervals thereafter. In the present case, petitioner relies upon the opinion—lacking adequate foundation—of an expert who first saw the insured more than twenty years after his insurance lapsed, when he examined him for the purpose of testifying.

In the *Halliday* case, records of hospital treatment of the insured for a back injury, while his insurance was in force, recited that he was "very nervous" and that he gave "impressions of neuras-

thenia". The insured in the present case likewise received hospital treatment over an extended period of time while his insurance was in force, but the records relating to it contain nothing to indicate that he was suffering from mental or nervous disorder of any character.

In the *Halliday* case, records reflecting that the insured was found to be very nervous prior to the lapse of his policy, were supplemented by records showing that his condition was regarded periodically upon examination by mental experts as reflecting hypochondriasis and related ailments over a period commencing less than two years after the insurance lapsed. In the present case, records containing nothing to show nervous or mental disability while the insurance was in force, are supplemented by other records showing that periodically, as late as December 1920, the insured was found upon medical examination to be physically and mentally sound. It is not shown in this case that the insured was found by a medical examiner to have any mental or nervous disability until 1930.

In the *Halliday* case, there was no evidence comparable with that here presented showing that subsequent to the time when total permanent disability is alleged to have occured, the insured twice enlisted in the armed forces and actually performed regular duty therein in a manner indicating to his superior officers that he had no mental derangement whatever.

In the *Halliday* case, there was no extended period of time with respect to which no proof at all was offered. In the present case, petitioner's proof leaves a period of eight years wholly blank.

CONCLUSION

It is respectfully submitted that the district court properly directed the jury to return a verdict for the respondent and, therefore, that the judgment below should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 553.—October Term, 1942.

Joseph Galloway, by Freda Galloway, his Guardian, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Petitioner seeks benefits for total and permanent disability by reason of insanity he claims existed May 31, 1919. On that day his policy of yearly renewable term insurance lapsed for nonpayment of premium.[1]

The suit was filed June 15, 1938. At the close of all the evidence the District Court granted the Government's motion for a directed verdict. Judgment was entered accordingly. The Circuit Court of Appeals affirmed. 130 F. 2d 467. Both courts held the evidence legally insufficient to sustain a verdict for petitioner. He says this was erroneous and, in effect, deprived him of trial by jury, contrary to the Seventh Amendment.

The constitutional argument, as petitioner has made it, does not challenge generally the power of federal courts to withhold or withdraw from the jury cases in which the claimant puts forward insufficient evidence to support a verdict.[2] The contention is merely that his case as made was substantial, the courts' decisions to the contrary were wrong, and therefore their effect has been to deprive him of a jury trial. Petitioner relies particularly upon *Halliday* v. *United States*, 315 U. S. 94, and *Berry* v. *United*

[1] The contract was issued pursuant to the War Risk Insurance Act and insured against death or total permanent disability. (Act of Oct. 6, 1917, c. 105, § 400, 40 Stat. 398, 409.) Pursuant to statutory authority (Act of May 20, 1918, c. 77, § 13, 40 Stat. 555), T. D. 20 W. R., promulgated March 9, 1918, provided:

"Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed . . . to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. . . ." (Regulations and Procedure, U. S. Veterans Bureau, Part I, p. 9.)

[2] See, however, Part III, *infra*.

States, 312 U. S. 450, citing also *Gunning* v. *Cooley*, 281 U. S. 90. These cases and others relied upon are distinguishable upon the facts, as will appear. Upon the record and the issues as the parties have made them, the only question is whether the evidence was sufficient to sustain a verdict for petitioner. On that basis, we think the judgments must be affirmed.

I.

Certain facts are undisputed. Petitioner worked as a longshoreman in Philadelphia and elsewhere prior to enlistment in the Army November 1, 1917.[3] He became a cook in a machine gun battalion. His unit arrived in France in April, 1918. He served actively until September 24. From then to the following January he was in a hospital with influenza. He then returned to active duty. He came back to the United States, and received honorable discharge April 29, 1919. He enlisted in the Navy January 15, 1920, and was discharged for bad conduct in July. The following December he again enlisted in the Army and served until May, 1922, when he deserted. Thereafter he was carried on the Army records as a deserter.

In 1930 began a series of medical examinations by Veterans' Bureau physicians. On May 19 that year his condition was diagnosed as "Moron, low grade; observation, dementia praecox, simple type." In November, 1931, further examination gave the diagnosis, "Psychosis with other diseases or conditions (organic disease of the central nervous system—type undetermined)." In July, 1934, still another examination was made, with diagnosis: "Psychosis-manic and depressive insanity incompetent; hypertension, moderate; otitis media, chronic, left; varicose veins left, mild; abscessed teeth roots; myocarditis, mild."

Petitioner's wife, the nominal party in this suit, was appointed guardian of his person and estate in February, 1932. Claim for insurance benefits was made in June, 1934, and was finally denied by the Board of Veterans' Appeals in January, 1936. This suit followed two and a half years later.

Petitioner concededly is now totally and permanently disabled by reason of insanity and has been for some time prior to institution of this suit. It is conceded also that he was sound in mind and body until he arrived in France in April, 1918.

[3] The record does not show whether this employment was steady and continuous or was spotty and erratic. But there is no contention petitioner's behavior was abnormal before he arrived in France in April, 1918.

The theory of his case is that the strain of active service abroad brought on an immediate change, which was the beginning of a mental breakdown that has grown worse continuously through all the later years. Essential in this is the view it had become a total and permanent disability not later than May 31, 1919.

The evidence to support this theory falls naturally into three periods, namely, that prior to 1923; the interval from then to 1930; and that following 1930. It consists in proof of incidents occurring in France to show the beginnings of change; testimony of changed appearance and behavior in the years immediately following petitioner's return to the United States as compared with those prior to his departure; the medical evidence of insanity accumulated in the years following 1930; and finally the evidence of a physician, given largely as medical opinion, which seeks to tie all the other evidence together as foundation for the conclusion, expressed as of 1941, that petitioner's disability was total and permanent as of a time not later than May of 1919.

Documentary exhibits included military, naval and Veterans' Bureau records. Testimony was given by deposition or at the trial chiefly by five witnesses. One, O'Neill, was a fellow worker and friend from boyhood; two, Wells and Tanikawa, served with petitioner overseas; Lt. Col. Albert K. Mathews, who was an Army chaplain, observed him or another person of the same name at an Army hospital in California during early 1920; and Dr. Wilder, a physician, examined him shortly before the trial and supplied the only expert testimony in his behalf. The petitioner also put into evidence the depositions of Commander Platt and Lt. Col. James E. Matthews, his superior officers in the Navy and the Army, respectively, during 1920-22.

What happened in France during 1918-19 is shown chiefly by Wells and Tanikawa. Wells testified to an incident at Aisonville, where the unit was billeted shortly after reaching France and before going into action. Late at night petitioner created a disturbance, "hollering, screeching, swearing. . . . The men poured out from the whole section." Wells did not see the incident, but heard petitioner swearing at his superior officers and saw "the result, a black eye for Lt. Warner." However, he did not see "who gave it to him."[4] Wells personally observed no infraction of discipline except this incident, and did not know what brought it on.

[4] Wells heard of another incident at Monthurel in June, but his testimony concerning this was excluded as hearsay.

Petitioner's physical appearance was good, he "carried on his duties as a cook all right," and the witness did not see him after June 1, except for about three days in July when he observed petitioner several times at work feeding stragglers.

Tanikawa, Hawaiian-born citizen, served with pe[illegible] from the latter's enlistment until September, 1918, when Galloway was hospitalized, although the witness thought they had fought together and petitioner was "acting queer" at the Battle of the Argonne in October. At Camp Greene, North Carolina, petitioner was "just a regular soldier, very normal, . . . pretty neat." After reaching France "he was getting nervous . . ., kind of irritable, always picking a fight with other soldiers." This began at Aisonville. Tanikawa saw Galloway in jail, apparently before June. It is not clear whether these are references to the incident Wells described.

Tanikawa described another incident in June "when we were on the Marne," the Germans "were on the other side and we were on this side." It was a new front, without trenches. The witness and petitioner were on guard duty with others. Tanikawa understood the Germans were getting ready for a big drive. "One night he [petitioner] screamed. He said, 'The Germans are coming' and we all gagged him." There was no shooting, the Germans were not coming, and there was nothing to lead the witness to believe they were. Petitioner was court martialed for the matter, but Tanikawa did not know "what they did with him." He did not talk with Galloway that night, because "he was out of his mind" and appeared insane. Tanikawa did not know when petitioner left the battalion or what happened to him after (as the witness put it) the Argonne fight, but heard he went to the hospital, "just dressing station I guess." The witness next saw Galloway in 1936, at a disabled veterans' post meeting in Sacramento, California. Petitioner then "looked to me like he wasn't all there. Insane. About the same . . . as compared to the way he acted in France, particularly when they gagged him . . . ."

O'Neill was "born and raised with" petitioner, worked with him as a longshoreman, and knew him "from when he come out of the army for seven years, . . . I would say five or six years." When petitioner returned in April or May, 1919, "he was a wreck compared to what he was when he went away. The fellow's mind was evidently unbalanced." Symptoms specified were withdraw-

ing to himself; crying spells; alternate periods of normal behavior and nonsensical talk; expression of fears that good friends wanted "to beat him up"; spitting blood and remarking about it in vulgar terms. Once petitioner said, "G-- d-- it, I must be a Doctor Jekyll and Mr. Hyde."

O'Neill testified these symptoms and this condition continued practically the same for about five years. In his opinion petitioner was "competent at times and others was incompetent." The intervals might be "a couple of days, a couple of months." In his normal period Galloway "would be his old self . . . absolutely O. K."

O'Neill was definite in recalling petitioner's condition and having seen him frequently in 1919, chiefly however, and briefly, on the street during lunch hour. He was not sure Galloway was working and was "surprised he got in the Navy, I think in the Navy or in the Government service."

O'Neill maintained he saw petitioner "right on from that [1920] at times." But his recollection of dates, number of opportunities for observation, and concrete events was wholly indefinite. He would fix no estimate for the number of times he had seen petitioner: "In 1920 I couldn't recall whether it was one or a thousand." For later years he would not say whether it was "five times or more or less." When he was pinned down by cross-examination, the effect of his testimony was that he recalled petitioner clearly in 1919 "because there was such a vast contrast in the man," but for later years he could give little or no definite information. The excerpt from the testimony set forth in the margin[5] shows this

[5] "X Can you tell us approximately how many times you saw him in 1919?
"A. No; I seen him so often that it would be hard to give any estimate.
"X And the same goes *for 1920?*
"A. *I wouldn't be sure about 1920. I remember him more when he first came home because there was such a vast contrast in the man.* Otherwise, if nothing unusual happened, I wouldn't probably recall him at all, you know, that is, recall the particular time and all.
"X Well, do you recall him *at all in 1920?*
"A. *I can't say.*
"X And could you swear whether or not you ever saw him *in 1921?*
"A. I think I seen him both in 1921 and 1920 and 1921 and right on. I might not see him for a few weeks or months at a time, but I think I saw him a few times in all the years right up to, as I say, at least five years after.
"X Can you give us *an estimate* as to the number of times you saw him *in 1920?*
"A. *No, I would not.*
"X Was it *more than five times or less?*
"A. In 1920 *I couldn't recall whether it was one or a thousand. The*

contrast. We also summarize below[6] other evidence which explains or illustrates the vagueness of the witness' recollection for events after 1919. O'Neill recalled one specific occasion after 1919 when petitioner returned to Philadelphia, "around 1920 or 1921, but I couldn't be sure," to testify in a criminal proceeding. He also said, "After he was away for five or six years, he came back to Philadelphia, but I wouldn't know nothing about dates on that. He was back in Philadelphia for five or six months or so, and he was still just evidently all right, and then he would be off."

Lt. Col. (Chaplain) Mathews said he observed a Private Joseph Galloway, who was a prisoner for desertion and a patient in the mental ward at Fort MacArthur Station Hospital, California, during a six weeks period early in 1920. The chaplain's testimony gives strong evidence the man he observed was insane. However, there is a fatal weakness in this evidence. In his direct testimony, which was taken by deposition, the chaplain said he was certain that the soldier was petitioner. When confronted with the undisputed fact that petitioner was on active duty in the Navy during the first half of 1920, the witness at first stated that he might have been mistaken as to the time of his observation. Subsequently he reasserted the accuracy of his original statement as to the time of observation, but admitted that he might have been mistaken in believing that the patient-prisoner was petitioner. In this con-

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time I recall him well is when he first come home, but I know that I seen him right on from that at times.

"X And the same goes for 1921, 1922, 1923 and 1924?

"A. I would say for five years afterwards, but I don't know just when or how often I seen him except when he first come home for the first couple of months.

"X *But for years after his return you couldn't say definitely whether you saw him five times or more or less, could you?*

A. *No*, because it was a thing that *there was a vast contrast when he first come home* and everybody noticed it and remarked about it and it was more liable to be remembered. You could ask me about some more friends I knew during those years and I wouldn't know except there was something unusual." (Emphasis added.)

[6] Petitioner's own evidence shows without dispute he was on active duty in the Navy from January 15, 1920, to July of that year and in the Army from December, 1920, to May 6, 1922. As is noted in the text, O'Neill was not sure he was working and "was surprised he got in the Navy, I think in the Navy or in the Government service." He only "heard some talk" of petitioner's having reenlisted in the Army, but "*if it was the fact*, I would be surprised that he could do it owing to his mental condition." (Emphasis added.) O'Neill was not certain that he saw Galloway in uniform after the first week of his return to Philadelphia from overseas, although he said he saw petitioner during "the periods of those reenlistments . . . but I can't recall about it."

nection he volunteered the statement, "Might I add, sir, that I could not now identify that soldier if I were to meet him face to face, and that is because of the long lapse of time." The patient whom the witness saw was confined to his bed. The record is barren of other evidence, whether by the hospital's or the Army's records or otherwise, to show that petitioner was either patient or prisoner at Fort MacArthur in 1920 or at any other time.

Commander Platt testified that petitioner caused considerable trouble by disobedience and leaving ship without permission during his naval service in the first half of 1920. After "repeated warnings and punishments, leading to court martials," he was sentenced to a bad conduct discharge.

Lt. Col. James E. Matthews (not the chaplain) testified by deposition which petitioner's attorney interrupted Dr. Wilder's testimony to read into evidence. The witness was Galloway's commanding officer from early 1921 to the summer of that year, when petitioner was transferred with other soldiers to another unit. At first Colonel Matthews considered making petitioner a corporal, but found him unreliable and had to discipline him. Petitioner "drank considerably," was "what we called a bolshevik," did not seem loyal, and "acted as if he was not getting a square deal." The officer concluded "he was a moral pervert and probably used narcotics," but could not secure proof of this. Galloway was court martialed for public drunkenness and disorderly conduct, served a month at hard labor, and returned to active duty. At times he "was one of the very best soldiers I had," at others undependable. He was physically sound, able to do his work, perform close order drill, etc., "very well." He had alternate periods of gaiety and depression, talked incoherently at times, gave the impression he would fight readily, but did not resent orders and seemed to get along well with other soldiers. The officer attributed petitioner's behavior to alcohol and narcotics and it occurred to him at no time to question his sanity.

Dr. Wilder was the key witness. He disclaimed specializing in mental disease, but qualified as having given it "special attention." He first saw petitioner shortly before the trial, examined him "several times." He concluded petitioner's ailment "is a schizophrenic branch or form of praecox." Dr. Wilder heard the testimony and read the depositions of the other witnesses, and examined the documentary evidence. Basing his judgment upon this

material, with inferences drawn from it, he concluded petitioner was born with "an inherent instability," though he remained normal until he went to France; began there "to be subjected to the strain of military life, then he began to go to pieces." In May, 1919, petitioner "was still suffering from the acuteness of the breakdown . . . . . He is going down hill still, but the thing began with the breakdown . . . . . " Petitioner was "definitely insane, yes, sir," in 1920 and "has been insane at all times, at least since July, 1918, the time of this episode on the Marne"; that is, "to the point that he was unable to adapt himself. I don't mean he has not had moments when he could not perform some routine tasks," but "from an occupational standpoint . . . he has been insane." He could follow "a mere matter of routine," but would have no incentive, would not keep a steady job, come to work on time, or do anything he didn't want to do. Dr. Wilder pointed to petitioner's work record before he entered the service and observed: "At no time after he went into the war do we find him able to hold any kind of a job. He broke right down." He explained petitioner's enlistment in the Navy and later in the Army by saying, "It would have been no trick at all *for a man who was reasonably conforming* to get into the Service." (Emphasis added.)

However, the witness knew "nothing whatever except his getting married" about petitioner's activities between 1925 and 1930, and what he knew of them between 1922 and 1925 was based entirely on O'Neill's testimony and a paper not of record here.[7] Dr. Wilder at first regarded knowledge concerning what petitioner was doing between 1925 and 1930 as not essential. "We have a continuing disease, quite obviously beginning during his military service, and quite obviously continuing in 1930, and *the minor incidents* don't seem to me ——" (Emphasis added.) Counsel for the government interrupted to inquire, "Well, if he was continuously employed for eight hours a day from 1925 to 1930 would that have any bearing?" The witness replied, "It would have a great deal." Upon further questioning, however, he reverted to his first position stating it would not be necessary or helpful for him to know what petitioner was doing from 1925 to 1930: "I testified from the information I had."

[7] It is to be noted the witness did not refer to Chaplain Mathews' testimony.

II.

This, we think, is the crux of the case and distinguishes it from the cases on which petitioner has relied.[8] His burden was to prove total and permanent disability as of a date not later than May 31, 1919. He has undertaken to do this by showing incipience of mental disability shortly before that time and its continuance and progression throughout the succeeding years. He has clearly established incidence of total and permanent disability as of some period prior to 1938, when he began this suit.[9] For our purposes this may be taken as medically established by the Veterans' Bureau examination and diagnosis of July, 1934.[10]

But if the record is taken to show that some form of mental disability existed in 1930, which later became total and permanent, petitioner's problem remains to demonstrate by more than speculative inference that this condition itself began on or before May 31, 1919 and continuously existed or progressed through the intervening years to 1930.

To show origin before the crucial date, he gives evidence of two abnormal incidents occurring while he was in France, one creating the disturbance before he came near the fighting front, the other yelling that the Germans were coming when he was on guard duty at the Marne. There is no other evidence of abnormal behavior during his entire service of more than a year abroad.

[8] None of them exhibits a period of comparable length as to which evidence is wholly lacking and under circumstances which preclude inference the omission was unintentional.

[9] He has not established a fixed date at which contemporaneous medical examination, both physical and mental, establishes totality and permanence prior to Dr. Wilder's examinations in 1941.

Dr. Wilder testified that on the evidence concerning petitioner's behavior at the time of his discharge in 1919, and without reference to the testimony as to later conduct, including O'Neill's, he would reserve his opinion on whether petitioner was then "crazy"—"I wouldn't have enough—"

[10] The previous examinations of 1930 and 1931 show possibility of mental disease in the one case and existence of psychosis with other disease, organic in character but with type undetermined, in the other. These two examinations without more do not prove existence of total and permanent disability; on the contrary, they go far toward showing it could not be established then medically.

The 1930 diagnosis shows only that the examiner regarded petitioner as a moron of low grade, and recommended he be observed for simple dementia praecox. Dr. Wilder found no evidence in 1941 that petitioner was a moron. The 1931 examination is even less conclusive in one respect, namely, that "psychosis" takes the place of moronic status. Dr. Wilder also disagreed with this diagnosis. However, this examination first indicates existence of organic nervous disease. Not until the 1934 diagnosis is there one which might be regarded as showing possible total and permanent disability by medical evidence contemporaneous with the fact.

That he was court martialed for these sporadic acts and bound and gagged for one does not prove he was insane or had then a general breakdown in "an already fragile mental constitution," which the vicissitudes of a longshoreman's life had not been able to crack.

To these two incidents petitioner adds the testimony of O'Neill that he looked and acted like a wreck, compared with his former self, when he returned from France about a month before the crucial date, and O'Neill's vague recollections that this condition continued through the next two, three, four, or five years.

O'Neill's testimony apparently takes no account of petitioner's having spent 101 days in a hospital in France with influenza just before he came home. But, given the utmost credence, as is required, it does no more than show that petitioner was subject to alternating periods of gaiety and depression for some indefinite period after his return, extending perhaps as late as 1922. But because of its vagueness as to time, dates, frequency of opportunity for observation, and specific incident, O'Neill's testimony concerning the period from 1922 to 1925 is hardly more than speculative.

We have then the two incidents in France followed by O'Neill's testimony of petitioner's changed condition in 1919 and its continuance to 1922.[11] There is also the testimony of Commander Platt and Lt. Col. James E. Matthews as to his service in the Navy and the Army, respectively, during 1920-1922. Neither thought petitioner was insane or that his conduct indicated insanity. Then follows a chasm of eight years. The only evidence[12] we have concerning this period is the fact that petitioner married his present guardian at some time within it, an act from which in the legal sense no inference of insanity can be drawn.

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[11] Chaplain Mathews' testimony would be highly probative of insanity existing early in 1920, if petitioner were sufficiently identified as its subject. However, the bare inference of identity which might otherwise be drawn from the mere identity of names cannot be made reasonably in view of its overwhelming contradiction by other evidence presented by petitioner and the failure to produce records from Fort MacArthur Hospital or the Army or from persons who know the fact that petitioner had been there at any time. The omission eloquently testifies in a manner which no inference could overcome that petitioner never was there. The chaplain's testimony therefore should have been stricken, had the case gone to the jury, and petitioner can derive no aid from it here.

Tanikawa, it may be recalled, did not profess to have seen petitioner between October, 1918, and 1936.

[12] Apart from O'Neill's vague recollection of petitioner's return to Philadelphia on one occasion.

This period was eight years of continuous insanity, according to the inference petitioner would be allowed to have drawn. If so, he should have no need of inference. Insanity so long and continuously sustained does not hide itself from the eyes and ears of witnesses.[13] The assiduity which produced the evidence of two "crazy" incidents during a year and a half in France should produce one during eight years or, for that matter, five years in the United States.

Inference is capable of bridging many gaps. But not, in these circumstances, one so wide and deep as this. Knowledge of petitioner's activities and behavior from 1922 or 1925 to 1930 was peculiarly within his ken and that of his wife, who has litigated this cause in his and presumably, though indirectly, in her own behalf. His was the burden to show continuous disability. What he did in this time, or did not do, was vital to his case. Apart from the mere fact of his marriage, the record is blank for five years and almost blank for eight. For all that appears, he may have worked full time and continuously for five and perhaps for eight, with only a possible single interruption.[14]

No favorable inference can be drawn from the omission. It was not one of oversight or inability to secure proof. That is shown by the thoroughness with which the record was prepared for all other periods, before and after this one, and by the fact petitioner's wife, though she married him during the period and was available, did not testify. The only reasonable conclusion

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[13] The only attempt to explain the absence of testimony concerning the period from 1922 to 1930 is made by counsel in the reply brief: "The insured, it will be observed, was never apprehended after his desertion from the Army in 1922. It is only reasonable that a person with the status of a deserter at large . . . . , whose mind was in the condition of that of this insured, would absent himself from those with whom he would usually associate because of fear of apprehension and punishment. His mental condition . . . at the time of trial . . . clearly shows that he could not have testified. . . . A lack of testimony from 1922 to 1930 is thus explained, and the jury could well infer that only the then [1941] admittedly insane insured was in a position to know where he was and what he was doing during those years; as he had lost his mental faculties, the reason for lack of proof during these years is apparent."

The "explanation" is obviously untenable. It ignores the one fact proved with relation to the period, that petitioner was married during it. His wife was nominally a party to the suit, and obviously available as a witness. It disregards the fact petitioner continued in the status of deserter after 1930, yet produced evidence relating to the period from that time on. It assumes he was insane during the eight years, yet succeeded during that long time in absenting himself from persons who could testify in his favor.

[14] *Cf.* note 12, *supra.*

is that petitioner, or those who acted for him, deliberately chose, for reasons no doubt considered sufficient (and which we do not criticize, since such matters, including tactical ones, are for the judgment of counsel) to present no evidence or perhaps to withhold evidence readily available concerning this long interval, and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap and take the place of evidence which, according to all reason, must have been at hand.[15] To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof. Furthermore, the inference would be more plausible perhaps if the evidence of insanity as of May, 1919, were stronger than it is, such for instance as Chaplain Mathews' testimony would have furnished if it could be taken as applying to petitioner. But, on this record, the evidence of insanity as of that time is thin at best, if it can be regarded as at all more than speculative.[16]

Beyond this, there is nothing to show totality or permanence. These come only by what the Circuit Court of Appeals rightly characterized as "long-range retroactive diagnosis." That might suffice, notwithstanding this crucial inference was a matter of opinion, if there were factual evidence over which the medical eye could travel and find continuity through the intervening years. Cf. *Halliday* v. *United States*, *supra*. But eight years are too many to permit it to skip, when the bridgeheads (if the figure may be changed) at each end are no stronger than they are here, and when the seer first denies, then admits, then denies again, that what took place in this time would make "a great deal" of difference in what he saw. Expert medical inference rightly can do much. But we think the feat attempted here too large for its accomplishment.

The Circuit Court of Appeals thought petitioner's enlistments and service in the Navy and Army in 1920-1922 were in them-

[15] Compare Bishop v. Copp, 96 Conn. 571, 580; Murphree v. Senn, 107 Ala. 424; Aldrich v. Aldrich, 215 Mass. 164.

[16] Cf. Dr. Wilder's admission, note 10, *supra*.

selves "such physical facts as refute any reasonable inferences which may be drawn from the evidence here presented by him that he was *totally* and *permanently* disabled during the life of his policy." 130 F. 2d 471; cf. *Atkins* v. *United States*, 63 App. D. C. 164, 70 F. 2d 768, 771; *United States* v. *Le Duc*, 48 F. 2d 789, 793 (C. C. A.). The opinion also summarizes and apparently takes account of the evidence presented on behalf of the Government. 130 F. 2d 469, 470. In view of the ground upon which we have placed the decision, we need not consider these matters.

III.

What has been said disposes of the case as the parties have made it. For that reason perhaps nothing more need be said. But objection has been advanced that, in some manner not wholly clear, the directed verdict practice offends the Seventh Amendment.

It may be noted, first, that the Amendment has no application of its own force to this case. The suit is one to enforce a monetary claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a matter of right for persons asserting claims against the sovereign.[17] Whatever force the Amendment has therefore is derived because Congress, in the legislation cited,[18] has made it applicable. Even so, the objection made on the score of its requirements is untenable.

If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly

[17] Neither the Amendment's terms nor its history suggest it was intended to extend to such claims. The Court of Claims has functioned for almost a century without affording jury trial in cases of this sort and without offending the requirements of the Amendment. McElrath v. United States, 102 U. S. 426; see Richardson, History, Jurisdiction and Practice of the Court of Claims (2d ed. 1885). Cf. also note 18, *infra*.

[18] 43 Stat. 1302, 38 U. S. C. § 445; see H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2; Pence v. United States, 316 U. S. 332, 334; Whitney v. United States, 8 F. 2d 476 (C. C. A.); Hacker v. United States, 16 F. 2d 702 (C. C. A.).

Although Congress, in first permitting suits on War Risk Insurance policies, did not explicitly make them triable by jury, 40 Stat. 398, 410, the statute was construed to import "the usual procedure . . . in actions at law for money compensation." Law v. United States, 266 U. S. 494, 496. In amending that Act, Congress provided that, except for differences not relevant here, the "procedure in such suits shall . . . be the same as that provided for

a century.[19] More recently the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; *Berry* v. *United States*, 312 U. S. 450. The objection therefore comes too late.

Furthermore, the argument from history is not convincing. It is not that "the rules of the common law" in 1791 deprived trial courts of power to withdraw cases from the jury, because not made out, or appellate courts of power to review such determinations. The jury was not absolute master of fact in 1791. Then as now courts excluded evidence for irrelevancy and relevant proof for other reasons.[20] The argument concedes they weighed the evidence, not only piecemeal but *in toto* for submission to the jury, by at least two procedures, the demurrer to the evidence and the motion for a new trial. The objection is not therefore to the basic thing,[21] which is the power of the court to withhold cases from the jury or set aside the verdict for insufficiency of the evidence. It is rather to incidental or collateral effects, namely, that the directed verdict as now administered differs from both those procedures because, on the one hand, allegedly higher standards of proof are required and, on the other, different consequences follow as to further maintenance of the litigation. Apart from the standards of proof, the argument appears to urge that in 1791, a litigant could challenge his opponent's evidence, either by the demurrer, which when determined ended the litigation, or by motion for a new trial which, if successful, gave the adversary another chance to prove his case; and therefore the Amendment excluded any challenge to which one or the other of these consequences does not attach.

The Amendment did not bind the federal courts to the exact procedural incidents or details of jury trial according to the common law in 1791, any more than it tied them to the common-law system of pleading or the specific rules of evidence then

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suits" under the Tucker Act. 43 Stat. 607, 613. Suits under the Tucker Act were tried without a jury (24 Stat. 505). However, within a year (in 1925) Congress amended that Act (43 Stat. 1302) with the intention to "give the claimant the right to a jury trial." H. R. Rep. No. 1518, 68th Cong., 2d Sess., 2.

[19] See, *e. g.*, Parks v. Ross, 11 How. 362; Improvement Co. v. Munson, 14 Wall. 442; Pleasants v. Fant, 22 Wall. 116; Commissioners of Marion County v. Clark, 94 U. S. 278; Ewing v. Goode, 78 Fed. 442 (C. C.); *cf.* Southern Ry. v. Walters, 284 U. S. 190; Gunning v. Cooley, 281 U. S. 90.

[20] Compare, *e. g.*, 3 Gilbert, The Law of Evidence (1792) 1181-5; Rex v. Paine, 5 Mod. 163; Folkes v. Chadd, 3 Doug. 157.

[21] *Cf.* Thoe v. Chicago, M. & St. P. R. R., 181 Wis. 456.

prevailing.[22] Nor were "the rules of the common law" then prevalent, including those relating to the procedure by which the judge regulated the jury's role on questions of fact, crystallized in a fixed and immutable system. On the contrary, they were constantly changing and developing during the late eighteenth and early nineteenth centuries.[23] In 1791 this process already had resulted in widely divergent common-law rules on procedural matters among the states, and between them and England.[24] And none of the contemporaneous rules regarding judicial control of the evidence going to juries or its sufficiency to support a verdict had reached any precise, much less final, form.[25] In addition, the passage of time has obscured much of the procedure which then may have had more or less definite form, even for historical purposes.[26]

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[22] Ex parte Peterson, 253 U. S. 300; Gasoline Products Co. v. Champlin Refining Co., 283 U. S. 494; Walker v. New Mexico & Southern Pacific R. R., 165 U. S. 593; Capital Traction Co. v. Hoff, 174 U. S. 1; *cf.* Stone, J., dissenting in Dimick v. Scheidt, 293 U. S. 474, 490. The rules governing the admissibility of evidence, for example, have a real impact on the jury's function as a trier of facts and the judge's power to impinge on that function. Yet it would hardly be maintained that the broader rules of admissibility now prevalent offend the Seventh Amendment because at the time of its adoption evidence now admitted would have been excluded. *Cf. e. g.*, Funk v. United States, 290 U. S. 371.

[23] *E. g.*, during the eighteenth and nineteenth centuries, the nonsuit was being transformed in practice from a device by which a plaintiff voluntarily discontinued his action in order to try again another day into a procedure by which a defendant could put in issue the sufficiency of the plaintiff's evidence to go to the jury, differing from the directed verdict in that respect only in form. Compare Blackstone's Commentaries, Book III (Cooley's ed., 1899) 376; Johnson, J., dissenting in Elmore v. Grymes, 1 Pet. 469 (1828); Oscanyan v. Winchester Arms Co., 103 U. S. 261, 264; Coughran v. Bigelow, 164 U. S. 301; see the historical survey in the comprehensive opinion of McAllister, J., in Hopkins v. Nashville, C. & St. L. Ry., 96 Tenn. 409. See generally 2 Tidd's Practice (4th Amer. ed., 1856) 861, 866-8. The nonsuit, of course, differed in consequence from the directed verdict, for it left the plaintiff free to try again. Oscanyan v. Winchester Arms Co., *supra*; Tidd's Practice, *supra*.

Similarly the demurrer to the evidence practice was not static during this period as a comparison of Cocksedge v. Fanshaw, 1 Doug. 118 (1779), with Gibson v. Hunter, 2 H. Bl. 187 (1793), and the American practice on the demurrer to the evidence reveals [see, *e. g.*, Stephens v. White, 2 Wash. 203 (Va. 1796); Patrick v. Hallet, 1 Johns. 241 (N. Y. 1806); Whittington v. Christian, 2 Randolph 353 (Va. 1824). See, generally, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465; Thayer, Preliminary Treatise on Evidence (1898) 234-9]. Nor was the conception of directing a verdict entirely unknown to the eighteenth century common law. See, *e. g.*, Wilkinson v. Kitchin, 1 Ld. Raymond 89 (K. B.); Syderbottom v. Smith, 1 Strange 649. While there is no reason to believe that the notion at that time even approximated in character the present directed verdict, the cases serve further to show the plastic and developing character of these procedural devices during the eighteenth and nineteenth centuries.

[24] See, *e. g.*, Quincy's Mass. Reports 553-72.

[25] See note 23, *supra*.

[26] See, *e. g.*, Schofield, New Trials and the Seventh Amendment, 8 Ill. L. Rev. 287, 381, 465.

This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions.[27]

Apart from the uncertainty and the variety of conclusion which follows from an effort at purely historical accuracy, the consequences flowing from the view asserted are sufficient to refute it. It may be doubted that the Amendment requires challenge to an opponent's case to be made without reference to the merits of one's own and at the price of all opportunity to have it considered. On the other hand, there is equal room for disbelieving it compels endless repetition of litigation and unlimited chance, by education gained at the opposing party's expense, for perfecting a case at other trials. The essential inconsistency of these alternatives would seem sufficient to refute that either or both, to the exclusion of all others, received constitutional sanctity by the Amendment's force. The first alternative, drawn from the demurrer to the evidence, attributes to the Amendment the effect of forcing one admission because another and an entirely different one is made,[28] and thereby compels conclusion of the litigation once and for all. The true effect of imposing such a risk would not be to guarantee the plaintiff a jury trial. It would be rather to deprive the defendant (or the plaintiff if he were the challenger) of that right; or, if not that, then of the right to challenge the legal sufficiency of the opposing case. The Amendment was not framed or adopted to deprive either party of either right. It is impartial in its guaranty of

[27] *Cf.* notes 22 and 23, *supra.*

[28] By conceding the full scope of an opponent's evidence and asserting its sufficiency in law, which is one thing, the challenger must be taken, perforce the Amendment, also to admit he has no case, if the other's evidence is found legally sufficient, which is quite another thing. In effect, one must stake his case, not upon its own merit on the facts, but on the chance he may be right in regarding his opponent's as wanting in probative content. If he takes the gamble and loses, he pays with his own case, regardless of its merit and without opportunity for the jury to consider it. To force this choice and yet deny that afforded by the directed verdict would be to imbed in the Constitution the hypertechnicality of common-law pleading and procedure in their heyday. *Cf.* note 22, *supra.*

both. To posit assertion of one upon sacrifice of the other would dilute and distort the full protection intended. The admitted validity of the practice on the motion for a new trial goes far to demonstrate this.[29] It negatives any idea that the challenge must be made at such a risk as the demurrer imposed. As for the other alternative, it is not urged that the Amendment guarantees another trial whenever challenge to the sufficiency of evidence is sustained. Cf. *Berry* v. *United States, supra.* That argument, in turn, is precluded by the practice on demurrer to the evidence.

Each of the classical modes of challenge, therefore, disproves the notion that the characteristic feature of the other, for effect upon continuing the litigation, became a part of the Seventh Amendment's guaranty to the exclusion of all others. That guaranty did not incorporate conflicting constitutional policies, that challenge to an opposing case must be made with the effect of terminating the litigation finally and, at the same time, with the opposite effect of requiring another trial. Alternatives so contradictory give room, not for the inference that one or the other is required, but rather for the view that neither is essential.[30]

Finally, the objection appears to be directed generally at the standards of proof judges have required for submission of evidence to the jury. But standards, contrary to the objection's assumption, cannot be framed wholesale for the great variety of situations in respect to which the question arises.[31] Nor is the matter greatly aided by substituting one general formula for

[29] Under that practice the moving party receives the benefit of jury evaluation of his own case and of challenge to his opponent's for insufficiency. If he loses on the challenge, the litigation is ended. But this is not because, in making it, he is forced to admit his own is insufficient. It is rather for the reasons that the court finds the opposite party's evidence is legally sufficient and the jury has found it outweighs his own. There is thus no forced surrender of one right from assertion of another.

On the other hand, if the challenger wins, there is another trial. But this is because he has sought it, not because the Amendment guarantees it.

[30] We have not given special consideration to the latest decisions touching the Amendment's effects in the different situations where a verdict has been taken, on the one hand, without reservation of the question of the sufficiency of the evidence, Slocum v. New York Life Ins. Co., 228 U. S. 364, and, on the other hand, with such a reservation, Baltimore & Carolina Line, Inc. v. Redman, 295 U. S. 654. *Cf.* Aetna Ins. Co. v. Kennedy, 301 U. S. 389. Whatever may be the exact effect of the latter and, more recently, of Rule 50 of the Federal Rules of Civil Procedure upon the former decision, it suffices to say that, notwithstanding the sharp division engendered in the Slocum case, there was no disagreement in it or in the Redman case concerning the validity of the practice of directing a verdict. On the contrary, the opinions make it plain that this was unquestioned and in fact conceded by all.

[31] *Cf.* 9 Wigmore, Evidence (1940) 296-299.

another. It hardly affords help to insist upon "substantial evidence" rather than "some evidence" or "any evidence," or vice versa. The matter is essentially one to be worked out in particular situations and for particular types of cases. Whatever may be the general formulation, the essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. The mere difference in labels used to describe this standard, whether it is applied under the demurrer to the evidence[32] or on motion for a directed verdict, cannot amount to a departure from "the rules of the common law" which the Amendment requires to be followed.[33] If there is abuse in this respect, the obvious remedy is by correction on appellate review.

Judged by this requirement, or by any standard other than sheer speculation, we are unable to conclude that one whose burden, by the nature of his claim, is to show continuing and total disability for nearly twenty years supplies the essential proof of continuity when he wholly omits to show his whereabouts, activities or condition for five years, although the record discloses evidence must have been available, and, further, throws no light upon three additional years, except for one vaguely described and dated visit to his former home. Nothing in the Seventh Amendment requires it should be allowed to join forces with the jury system to bring about such a result. That guaranty requires that the jury be allowed to make reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them. It permits expert opinion to have the force of fact when based on facts which sustain it. But it does not require that experts or the jury be permitted to make inferences from the withholding of crucial facts, favorable in their effects to the party who has the evidence of them in his peculiar knowledge and possession, but

[32] *Cf. e. g.* Fowle v. Alexandria, 11 Wheat. 320, 323 (1826), a demurer to the evidence admits "whatever the jury may reasonably infer from the evidence." Pawling v. United States, 4 Cranch, 219, 221-222 (1808). A demurrant to the evidence admits "the truth of the testimony to which he demurs and also those conclusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw." Cocksedge v. Fanshaw, *supra*; Patrick v. Hallet, *supra*; Stephens v. White, *supra*.

[33] *Cf.* Hughes, J., dissenting in Slocum v. New York Life Ins. Co., 228 U. S. 364, 408, and cases cited *supra*, note 22.

elects to keep it so. The words "total and permanent" are the statute's, not our own. They mean something more than incipient or occasional disability. We hardly need add that we give full credence to all of the testimony. But that cannot cure its inherent vagueness or supply essential elements omitted or withheld.

Accordingly, the judgment is

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 553.—October Term, 1942.

Joseph Galloway, by Freda Galloway, his Guardian, Petitioner, vs. The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 24, 1943.]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Murphy concur, dissenting.

The Seventh Amendment to the Constitution provides:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The Court here re-examines testimony offered in a common law suit, weighs conflicting evidence, and holds that the litigant may never take this case to a jury. The founders of our government thought that trial of fact by juries rather than by judges was an essential bulwark of civil liberty.[1] For this reason, among others, they adopted Article III, § 2 of the Constitution, and the Sixth and Seventh Amendments. Today's decision marks a continuation of the gradual process of judicial erosion which in one hundred fifty years has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.

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1 "I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson (Washington ed.) 71.

The operation of the jury trial system in civil cases has been subject to careful analysis; Clark and Shulman, Jury Trial in Civil Cases, 43 Yale L. Jour. 867; Harris, Is the Jury Vanishing, 7 N. Y. U. L. Q. 657. Its utility has been sharply criticized; Pound, Jury—England and United States, 8 Encyclopedia of the Social Sciences 492; Mr. Justice Miller, The System of Trial by Jury, 21 American L. Rev. 859 (1887). On the other hand, this Court has on occasion warmly praised this mode of trial: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts." Jacob v. New York, 315 U. S. 752.

I.

Alexander Hamilton in The Federalist emphasized his loyalty to the jury system in civil cases and declared that jury verdicts should be re-examined, if at all, only "by a second jury, either by remanding the cause to the court below for a second trial of the fact, or by directing an issue immediately out of the Supreme Court." He divided the citizens of his time between those who thought that jury trial was a "valuable safeguard to liberty" and those who thought it was "the very palladium of free government." However, he felt it unnecessary to include in the Constitution a specific provision placing jury trial in civil cases in the same high position as jury trial in criminal cases.[2]

Hamilton's view, that constitutional protection of jury trial in civil cases was undesirable, did not prevail. On the contrary, in response to widespread demands from the various State Constitutional Conventions, the first Congress adopted the Bill of Rights containing the Sixth and Seventh Amendments, intended to save trial in both criminal and common law cases from legislative or judicial abridgment.[3] The first Congress expected the Seventh Amendment to meet the objections of men like Patrick Henry to the Constitution itself. Henry, speaking in the Virginia Constitutional Convention, had expressed the general conviction of the people of the Thirteen States when he said, "Trial by jury is the best appendage of freedom. . . . We are told that we are to part with that trial by jury with which our ancestors secured their lives and property. . . . I hope we shall never be induced, by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. *The unanimous verdict of impartial men cannot be reversed.*"[4] The first Congress, therefore provided for trial of common law cases by a jury, even when such trials were in the Supreme Court itself. 1 Stat. 73, 81.

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[1] For Hamilton's views on the place of the jury in the Constitution, see The Federalist, Nos. 81 and 83.

[2] "One of the strongest objections taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases." Parsons v. Bedford, 3 Pet. 433, 446. Of the seven States which, in ratifying the Constitution, proposed amendments, six included proposals for the preservation of jury trial in civil cases. Documents Illustrative of the Formation of the Constitution, House Doc. No. 398, 69th Cong., 1st Sess., pp. 1019 (Massachusetts), 1026 (New Hampshire), 1029 (Virginia), 1036 (New York), 1046 (North Carolina), 1054 (Rhode Island).

[3] 4 Elliott's Debates, 324, 344. Emphasis added.

In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal[5] and civil cases the arbiters not only of fact but of law. Less than three years after the ratification of the Seventh Amendment, this Court called a jury in a civil case brought under our original jurisdiction. There was no disagreement as to the facts of the case. Chief Justice Jay, charging the jury for a unanimous Court, three of whose members had sat in the Constitutional Convention, said: "For, as on the one hand, it is presumed that juries are the best judges of fact; it is on the other hand presumable that the courts are the best judges of law. But still, both objects are lawfully within your power of decision." *Georgia* v. *Brailsford*, 3 Dall. 1, 4. Similar views were held by state courts in Connecticut, Massachusetts, Illinois, Louisiana and presumably elsewhere.[6]

The principal method by which judges prevented cases from going to the jury in the Seventeenth and Eighteenth Centuries was by the demurrer to the evidence, under which the defendant at the end of the trial admitted all facts shown by the plaintiff as well as all inferences which might be drawn from the facts, and asked for a ruling of the Court on the "law of the case."[7] See for example *Wright* v. *Pindar*, (1647) Alleyn 18 and *Pawling* v. *United States*, 4 Cranch 219. This practice fell into disuse in England in 1793, *Gibson* v. *Hunter*, 2 H. Bl. 187, and in the United States federal courts in 1826, *Fowle* v. *Alexandria*, 11 Wheat. 320. The power of federal judges to comment to the jury on the evidence gave them additional influence. *M'Lanahan* v. *Universal Insurance Co.*, 1 Pet. 170 (1828). The right of in-

[5] The early practice under which juries were empowered to determine issues of law in criminal cases was not formally rejected by this Court until 1894 in Sparf and Hansen v. United States, 156 U. S. 51, when the subject was exhaustively discussed. See also Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582. This jury privilege was once considered of high value; in fact, a principal count in the impeachment proceedings against Justice Chase in 1805 was that he had denied to a jury the right to determine both the law and the fact in a criminal case—a charge which Justice Chase denied. Report of Trial of Hon. Samuel Chase (1805), appendix p. 17. This privilege is still at least nominally retained for the jury in some states. Howe, 614. For a late 19th Century statement of this view see Kane v. Commonwealth, 89 Pa. St. 522 (1879).

[6] See Howe, *supra*, pp. 597, 601, 605, 610; Coffin v. Coffin, 4 Mass. 1, 25; Thayer on Evidence (1898 ed.) 234. And see Lectures given by Justice Wilson as Professor of Law at the College of Philadelphia in 1790 and 1792, Thayer, 254, and Sparf and Hansen v. United States, *supra*, at 158.

[7] I assume for the purpose of this discussion without deciding the point that the adoption of the Seventh Amendment was meant to have no limiting effect on the contemporary demurrer to evidence practice.

voluntary non-suit of a plaintiff, which might have been used to expand judicial power at jury expense was at first denied federal courts. *Elmore* v. *Grymes*, 1 Pet. 469; *DeWolf* v. *Rabaud*, 1 Pet. 476; but cf. *Coughran* v. *Bigelow*, 164 U. S. 301 (1896).

As Hamilton had declared in The Federalist, the basic judicial control of the jury function was in the court's power to order a new trial.[8] In 1830, this Court said: "The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings." *Parsons* v. *Bedford*, *supra*, at 448.[9] That retrial by a new jury rather than factual reevaluation by a court is a constitutional right of genuine value was restated as recently as *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364.[10]

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[8] A method used in early England of reversal of a jury verdict by the process of attaint which required a review of the facts by a new jury of twenty-four and resulted in punishment of the first jury for its error, had disappeared. Plucknett, A Concise History of the Common Law (2d ed.), 121.

[9] It is difficult to describe by any general proposition the circumstances under which a new trial would be allowed under early practice, since each case was so dependent on its peculiar facts. The early Pennsylvania rule was put as follows: "New trials are frequently necessary, for the purpose of attaining complete justice; but the important right of trial by jury requires they should never be granted without solid and substantial reasons; otherwise the province of jurymen might be often transferred to the judges, and they instead of the jury, would become the real triers of facts. A reasonable doubt, barely, that justice has not been done, especially in cases where the value or importance of the cause is not great, appears to me to be too slender a ground for them. But, whenever it appears with a reasonable certainty, that actual and manifest injustice is done, or that the jury have proceeded on an evident mistake, either in point of law, or fact, or contrary to strong evidence, or have grossly misbehaved themselves, or given extravagant damages; the Court will always give an opportunity, by a new trial, of rectifying the mistake of the former jury, and of doing complete justice to the parties." Cowperthwaite v. Jones, 4 Dall. 55 (Phila. Ct. Com. Pleas 1790). For expressions in substantial accord see Maryland Insurance Co. v. Ruden's Administrator, 6 Cranch 338, 340; M'Lanahan v. Universal Insurance Co., 1 Pet. 170, 183. For similar State practice see Utica Insurance Co. v. Badger, 3 Wend. 102 (1829); New York Firemen Insurance Co. v. Walden, 12 Johns. 513 (1815). The motion for new trial was addressed to the discretion of the trial judge and was not reviewable in criminal or civil cases. United States v. Daniel, 6 Wheat. 542, 548; Brown v. Clarke, 4 How. 4, 15. The number of new trials permitted in a given case were usually limited to two or three; see e. g. Louisville and N. R. R. v. Woodson, 134 U. S. 614. The power of the judge was thus limited to his authority to return the case to a new jury for a new decision.

[10] Cf. Baltimore and Carolina Line v. Redmond, 295 U. S. 654; Aetna Insurance Co. v. Kennedy, 301 U. S. 389. See Rule 50(b) of the Rules of Civil Procedure; Montgomery Ward v. Duncan, 311 U. S. 243; Berry v. United States, 312 U. S. 450.

A long step toward the determination of fact by judges instead of by juries was the invention of the directed verdict.[11] In 1850, what seems to have been the first directed verdict case considered by this Court, *Parks* v. *Ross*, 11 How. 362, was presented for decision. The Court held that the directed verdict serves the same purpose as the demurrer to the evidence, and that since there was "no evidence whatever"[13] on the critical issue in the case, the directed verdict was approved.[14] The decision was an innovation, a departure from the traditional rule restated only fifteen years before in *Greenleaf* v. *Birch*, 9 Pet. 292, 299 (1835) in which this Court had said: "Where there is no evidence tending to prove a particular fact, the courts are bound so to instruct the jury, when requested; but they cannot legally give any instruction which shall take from the jury the right of weighing the evidence and determining what effect it shall have."

This new device contained potentialities for judicial control of the jury which had not existed in the demurrer to the evidence. In the first place, demurring to the evidence was risky business, for in so doing the party not only admitted the truth of all the testimony against him but also all reasonable inferences which might be drawn from it; and upon joinder in demurrer the case was withdrawn from the jury while the court proceeded to give final judgment either for or against the demur-

[11] I do not mean to minimize other forms of judicial control. In a summary of important techniques of judicial domination of the jury, Thayer lists the following: control by the requirement of a "reasonable judgment"—i. e., one satisfactory to the judge; control of the rules of "presumption", cf. the dissenting opinion in New York Life Insurance Co. *v.* Gamer, 303 U. S. 161, 172; the control of the "definition of language"; the control of rules of practice, and forms of pleading ("It is remarkable how judges and legislatures in this country are unconsciously travelling back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions. Logic and neatness of legal theory have always called loud, at least in recent centuries, for special verdicts. . . . Considerations of policy have called louder for leaving to the jury a freer hand." 218); the control of "mixed questions of law and fact"; the control of factual decisions by appellate courts. Thayer on Evidence (1898 ed.) p. 208 *et seq.*

[12] Counsel seeking the directed verdict said: "This prerogative of the court is never exercised, but in cases where the evidence is so indefinite and unsatisfactory, that nothing but wild, irrational conjecture, or licentious speculation, could induce the jury to pronounce the verdict which is sought at their hands." Parks *v.* Ross, *supra*, at 372.

[14] See also, Pleasants *v.* Fant, 22 Wall. 116 (1874) Oscanyan *v.* Arms Co. 103 U. S. 261 (1880); and Baylis *v.* Travellers Insurance Co., 113 U. S. 316 (1884). For an excellent discussion of the history of the directed verdict see Hackett, Has a Trial Judge of a United States Court the Right to Direct a Verdict?, 24 Yale L. Jour. 127.

rant. *Hopkins* v. *Nashville, C. & St. L. Ry.*, 96 Tenn. 409; *Suydam* v. *Williamson*, 20 How. 427, 436; *Bass* v. *Rublee*, 76 Vt. 395, 400. Imposition of this risk was no mere technicality; for by making withdrawal of a case from the jury dangerous to the moving litigant's cause, the early law went far to assure that facts would never be examined except by a jury. Under the directed verdict practice the moving party takes no such chance, for if his motion is denied, instead of suffering a directed verdict against him, his case merely continues into the hands of the jury. The litigant not only takes no risk by a motion for a directed verdict, but in making such a motion gives himself two opportunities to avoid the jury's decision; for under the federal variant of judgment not withstanding the verdict, the judge may reserve opinion on the motion for a directed verdict and then give judgment for the moving party after the jury was formally found against him.[14] In the second place, under the directed verdict practice the courts soon abandoned the "admission of all facts and reasonable inferences" standard referred to, and created the so-called "substantial evidence" rule which permitted directed verdicts even though there was far more evidence in the case than a plaintiff would have needed to withstand a demurrer.

The substantial evidence rule did not spring into existence immediately upon the adoption of the directed verdict device. For a few more years[15] federal judges held to the traditional rule that juries might pass finally on facts if there was "any evidence" to support a party's contention. The rule that a case must go to the jury unless there was "no evidence" was completely repudiated in *Improvement* v. *Munson*, 14 Wall. 442, 447 (1871), upon which the Court today relies in part. There the Court declared that "some" evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks "a jury can properly proceed." The traditional rule was given an ugly name, "the scintilla rule", to hasten its demise. For a time traces of the old formula remained, as in *Randall* v. *B. & O. Railroad*, 109 U. S. 478, but the new spirit prevailed. See for example, *Pleasants* v.

[14] Rule 50(b) of the Rules of Civil Procedure and note 10, *supra*.

[15] In the period of the Civil War, the formula changed slightly but its effect was the same—if the evidence so much as "tended to prove the position" of the party, the case was for the jury. Drakely v. Gregg, 8 Wall. 42, 268; Hickman v. Jones, 9 Wall. 197, 201; Barney v. Schmeider, 9 Wall. 248, 253. Cf. United States v. Breitling, 20 How. 252; Goodman v. Simonds, 20 How. 343, 359.

Fant, supra, and *Commissioners* v. *Clark*, 4 Otto 278. The same transition from jury supremacy to jury subordination through judicial decisions took place in State courts.[16]

Later cases permitted the development of added judicial control.[17] New and totally unwarranted formulas, which should surely be eradicated from the law at the first opportunity, were added as recently as 1929 in *Gunning* v. *Cooley*, 281 U. S. 90, which, by sheerest dictum, made new encroachments on the jury's constitutional functions. There it was announced that a judge might weigh the evidence to determine whether he, and not the jury, thought it was "overwhelming" for either party, and then direct a verdict. Cf. *Pence* v. *United States*, 316 U. S. 332, 340. *Gunning* v. *Cooley*, at 94, also suggests quite unnecessarily for its decision, that "When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither." This dictum, which assumes that a judge can weigh conflicting evidence with mathematical precision and which wholly deprives the jury of the right to resolve that conflict, was applied in *Pennsylvania Railroad Co.* v. *Chamberlain*, 288 U. S. 333. With it, and other tools, jury verdicts on disputed facts have been set aside or directed verdicts authorized so regularly as to make the practice commonplace while the motion for directed verdict itself has become routine. See for example *Southern Railway Co.* v. *Walters*, 284 U. S. 190; *Atlantic Coast Line Railroad* v. *Temple*, 285 U. S. 143; *Lumbra* v. *United States*, 290 U. S. 551; *Pence* v. *United States, supra*; and *De Zon* v. *United States*, — U. S. —.

Even *Gunning* v. *Cooley*, at 94, acknowledged that "issues that depend on the credibility of witnesses . . . are to be decided by the jury."[18] Today the Court comes dangerously close to weighing the credibility of a witness and rejecting his testimony because the majority do not believe it.

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[16] For examples of early respect for juries, see Morton v. Fairbanks, 11 Pick. 368 (1831); Way v. Illinois Central Railway, 25 Iowa 585 (1873). For the development in Illinois, see 8 Ill. L. Rev. 287, 481-486. For the Pennsylvania development, compare Fitzwater v. Stout, 16 Pa. St. 22, and Thomas v. Thomas, 21 Pa. St. 315, with Hyatt v. Johnson, 91 Pa. St. 196, 200.

[17] One additional device was the remittitur practice which gives the court a method of controlling jury findings as to damages. Arkansas Valley Co. v. Mann, 130 U. S. 69.

[18] In Ewing v. Burnett, 11 Pet. 41, 51, this Court said: "It was also [the jury's] province to judge of the credibility of the witnesses, and the

The story thus briefly told depicts the constriction of a constitutional civil right and should not be continued. Speaking of an aspect of this problem, a contemporary writer saw the heart of the issue: "Such a reversal of opinion [as that of a particular State court concerning the jury function], if it were isolated, might have little significance, but when many other courts throughout the country are found to be making the same shift and to be doing so despite the provisions of statutes and constitutions there is revealed one aspect of that basic conflict in the legal history of America—the conflict between the people's aspiration for democratic government,[19] and the judiciary's desire for the orderly supervision of public affairs by judges."[20]

The language of the Seventh Amendment cannot easily be improved by formulas.[21] The statement of a district judge in *Tarter* v. *United States*, 17 F. Supp. 691, 693, represents, in my opinion, the minimum meaning of the Seventh Amendment:

"The Seventh Amendment to the Constitution guarantees a jury trial in law cases, where there is substantial evidence to support the claim of a plaintiff in an action. If a single witness testifies to a fact sustaining the issue between the parties, or if reasoning minds might reach different conclusions from the testimony of a single witness, one of which would substantially support the issue of the contending party, the issue must be left to the jury. Trial by jury is a fundamental guaranty of the rights of the

weight of their testimony, as tending, in a greater or less degree, to prove the facts relied on; as these were matters with which the court could not interfere, the plaintiff's right to the instruction asked, must depend upon the opinion of the court, on a finding by the jury in favour of the defendant, on every matter which the evidence conduced to prove; giving full credence to the witnesses produced by him, and discrediting the witness for the plaintiff".

[19] Another phase of this same conflict arises in the use of judicial power to punish for contempt of court without allowance of jury trial. Nelles and King, Contempt by Publication, 28 Col. L. Rev. 400, 524, and, for a sharp indictment of the free use of contempt jurisdiction as basically undemocratic, 553; Nye v. United States, 313 U. S. 33; Bridges v. California, 314 U. S. 252.

[20] Howe, *supra*, 615, 616. Howe continues: "What seems discreditable to the judiciary in the story which I have related is the fierce resolution and deceptive ingenuity with which the courts have refused to carry out the unqualified mandate of statutes and constitutions. It is possible to feel that the final solution of the problem has been wise without approving the frequently arrogant methods which courts have used in reaching that result."

[21] This Court has said of one type of case in Richmond and D. R. R. v. Powers, 149 U. S. 43, 45 (1893): "It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

people, and judges should not search the evidence with meticulous care to deprive litigants of jury trials."

The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that Constitutional right preserved. Either the judge or the jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain. We should not fail to meet the expectation of James Madison, who, in advocating the adoption of the Bill of Rights, said: "Independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; . . . they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of right." So few of these cases come to this Court that, as a matter of fact, the judges of the District Courts and the Circuit Courts of Appeal are the primary custodians of the Amendment. As for myself, I believe that a verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room whatever for honest difference of opinion over the factual issue in controversy. I shall continue to believe that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right even though each case necessarily turns on its peculiar circumstances.

II.

The factual issue for determination here is whether the petitioner incurred a total and permanent disability not later than May 31, 1919. It is undisputed that the petitioner's health was sound in 1918, and it is evidently conceded that he was disabled at least since 1930. When in the intervening period, did the disability take place?

A doctor who testified diagnosed the petitioner's case as a schizophrenic form of dementia praecox. He declared it to be sound medical theory that while a normal man can retain his sanity in the face of severe mental or physical shock, some persons are born with an inherent instability so that they are mentally unable to stand sudden and severe strain. The medical testimony

was that this petitioner belongs to the latter class and that the shock of actual conflict on the battle front brought on the incurable affliction from which he now suffers. The medical witness testified that the dominant symptoms of the condition are extreme introversion and preoccupation with personal interests, a persecution complex, and an emotional instability which may be manifested by extreme exhilaration alternating with unusual depression or irrational outbursts. Persons suffering from this disease are therefore unable to engage in continuous employment.

The petitioner relies on the testimony of wartime and post war companions and superiors to show that his present mental condition existed on the crucial date. There is substantial testimony from which reasonable men might conclude that the petitioner was insane from the date claimed.

Two witnesses testify as to the petitioner's mental irresponsibility while he was in France. The most striking incident in this testimony is the account of his complete breakdown while on guard duty as a result of which he falsely alarmed his military unit by screaming that the Germans were coming when they were not and was silenced only by being forceably bound and gagged. There was also other evidence that Galloway became nervous, irritable, quarrelsome and turbulent after he got to France. The Court disposes of this testimony, which obviously indicates some degree of mental unbalance, by saying no more than that it "does not prove he was insane." No reason is given, nor can I imagine any, why a jury should not be entitled to consider this evidence and draw its own conclusions.

The testimony of another witness, O'Neill, was offered to show that the witness had known the petitioner both before and after the war, and that after the war the witness found the petitioner a changed man; that the petitioner imagined that he was being persecuted; and that the petitioner suffered from fits of melancholia, depression and weeping. If O'Neill's testimony is to be believed the petitioner suffered the typical symptoms of a schizophreniac for some years after his return to this country; therefore if O'Neill's testimony is believed, there can be no reasonable doubt about the right of a jury to pass on this case. The Court analyzes O'Neill's testimony for internal consistency, criticizes his failure to remember the details of his association with the petitioner fifteen years before his appearance in this case, and concludes that O'Neill's evidence shows no more than that "petitioner

was subject to alternating periods of gaiety and depression for some indefinite period." This extreme emotional instability is an accepted symptom of the disease from which the petitioner suffers. If he exhibited the same symptoms in 1922, it is, at the minimum, probable that the condition has been continuous since an origin during the war. O'Neill's testimony coupled with the petitioner's present condition presents precisely the type of question which a jury should resolve.

The petitioner was in the Navy for six months in 1920, until he was discharged for bad conduct, and later was in the Army during 1921 and a part of 1922 until he deserted. The testimony of his Commanding Officer while he was in the Army, Col. Matthews, is that the petitioner had "periods of gaiety and exhilaration" and was then "depressed as if he had had a hangover"; that petitioner tried to create disturbances and dissatisfy the men; that he suffered from a belief that he was being treated unfairly; and that generally his actions "were not those of a normal man". The Colonel was not a doctor and might well not have recognized insanity had he seen it; as it was, he concluded that the petitioner was an alcoholic and a narcotic addict. However, the officer was unable, upon repeated investigations, to discover any actual use of narcotics. A jury fitting this information into the general pattern of the testimony might well have been driven to the conclusion that the petitioner was insane at the time the Colonel had him under observation.

All of this evidence, if believed, showed a man healthy and normal before he went to the war suffering for several years after he came back from a disease which had the symptoms attributed to schizophrenia and who was insane from 1930 until his trial. Under these circumstances, I think that the physician's testimony of total and permanent disability by reason of continuous insanity from 1918 to 1938 was reasonable. The fact that there was no direct testimony for a period of five years, while it might be the basis of fair argument to the jury by the government, does not, as the Court seems to believe, create a presumption against the petitioner so strong that his case must be excluded from the jury entirely. Even if during these five years the petitioner was spasmodically employed, we could not conclude that he was not totally and permanently disabled. *Berry* v. *United States*, 312 U. S. 450, 455. It is not doubted that schizophrenia is permanent even though there may be a momentary appearance of recovery.

The court below concluded that the petitioner's admission into the military service between 1920 and 1923 showed conclusively that he was not totally and permanently disabled. Any inference which may be created by the petitioner's admission into the Army and the Navy is more than met by his record of court martial, dishonorable discharge, and desertion, as well as by the explicit testimony of his Commanding Officer, Colonel Matthews.

This case graphically illustrates the injustice resulting from permitting judges to direct verdicts instead of requiring them to await a jury decision and then, if necessary, allow a new trial. The chief reason given for approving a directed verdict against this petitioner is that no evidence except expert medical testimony was offered for a five to eight year period. Perhaps, now that the petitioner knows he has insufficient evidence to satisfy a judge even though he may have enough to satisfy a jury, he would be able to fill this time gap to meet any judge's demand. If a court would point out on a motion for new trial that the evidence as to this particular period was too weak, the petitioner would be given an opportunity to buttress the physician's evidence. If, as the Court believes, insufficient evidence has been offered to sustain a jury verdict for the petitioner, we should at least authorize a new trial. Cf. *Garrison* v. *United States*, 62 F. 2d 41, 42.

I believe that there is a reasonable difference of opinion as to whether the petitioner was totally and permanently disabled by reason of insanity on May 31, 1919, and that his case therefore should have been allowed to go to the jury. The testimony of fellow soldiers, friends, supervisors, and of a medical expert whose integrity and ability is not challenged cannot be rejected by any process available to me as a judge.